

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 77-6075

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, and
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

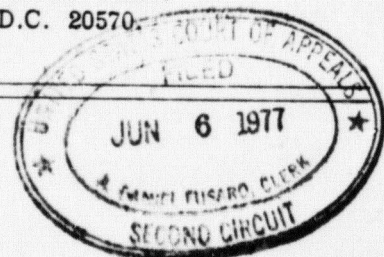
APPENDIX

ELLIOTT MOORE,

Deputy Associate General Counsel,

National Labor Relations Board.

Washington, D.C. 20570.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

v.

COMMITTEE OF INTERNS AND RESIDENTS, AND
THE NEW YORK STATE LABOR RELATIONS BOARD,

Defendants.
-----X

United States District Court
For The Southern District of
New York

Case No. 76 Civil 5119

Judge Stewart

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
COMMITTEE OF INTERNS AND RESIDENTS,	)	
AND THE NEW YORK STATE LABOR	)	
RELATIONS BOARD,	)	
	)	
Defendants.	)	

COMPLAINT FOR PRELIMINARY AND PERMANENT
INJUNCTION AND FOR DECLARATORY JUDGMENT

I

Plaintiff seeks an injunction preliminarily and permanently enjoining defendant Committee of Interns and Residents from requesting and attempting to require defendant New York State Labor Relations Board to assert jurisdiction over, or to regulate, or to consider, matters which are governed exclusively by the National Labor Relations Act, and likewise preliminarily and permanently enjoining defendant New York State Labor Relations Board from attempting to assert jurisdiction over, or to regulate, or to consider, matters which are governed by the National Labor Relations Act. Plaintiff also seeks a declaratory judgment under 28 U.S.C. Secs. 2201 and 2202 declaring that consideration of

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certain matters by defendant New York State Labor Relations Board would be invalid and without legal basis because said matters are within the exclusive jurisdiction of the National Labor Relations Board and are preempted by the National Labor Relations Act.

II

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1337. This action arises under the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq.

III

Plaintiff is an agency of the United States created by and charged with exclusive administration of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, et seq.).

IV

Defendant Committee of Interns and Residents (hereinafter "CIR") is an unincorporated association organized and existing under the laws of the State of New York, and having its principal office and place of business in the County of New York of the State of New York. Its membership is composed of medical interns, residents, and clinical fellows.

V

Defendant New York State Labor Relations Board (hereinafter "NYSLRB") is an agency of the State of New York. The State of New York is one of the several United States of America.

VI

Misericordia Hospital Medical Center (hereinafter "Misericordia") is a health care institution located in the county of Bronx in the State of New York.

VII

Albert Einstein College of Medicine (hereinafter "Albert Einstein") is a health care institution located in the County of Bronx in the State of New York.

VIII

Brookdale Hospital Medical Center (hereinafter "Brookdale"), the Hospital for Joint Diseases and Medical Center (hereinafter "Diseases Hospital") the Long Island Jewish-Hillside Medical Center (hereinafter "Jewish-Hillside"), and the Catholic Medical Center of Brooklyn and Queens, Inc. (hereinafter "Catholic Medical"), are health care institutions located in the counties of Queens, Kings, and New York of the State of New York.

IX

Beth Israel Medical Center (hereinafter "Beth Israel") is a health care institution located in the County of New York in the State of New York.

X

Defendant CIR filed a petition, dated April 14, 1976, with defendant NYSLRB by which defendant CIR sought certification as exclusive collective bargaining representative of the interns, residents and clinical fellows at Misericordia. An amended petition was filed on May 10, 1976, by defendant CIR with defendant NYSLRB.

XI

On June 15, 1976, plaintiff National Labor Relations Board issued an advisory opinion, on the petition of Misericordia. In its advisory opinion, plaintiff observed that the 1974 amendments to the National Labor Relations Act had extended the jurisdiction of the National Labor Relations Board to nonprofit health care institutions.

Accordingly plaintiff advised Misericordia and defendant CIR that "on the allegations submitted herein the Board would assert jurisdiction over the Employer's operations with respect to disputes cognizable under Sections 8, 9, and 10 of the [National Labor Relations Act]."

XII

Defendant NYSLRB, on July 14, 1976, issued an order dismissing the petition of defendant CIR regarding representation of the interns, residents and clinical fellows at Misericordia. Defendant NYSLRB stated in part:

It is undisputed that [Misericordia], like similar non-profit hospitals, is now subject to the jurisdiction of the [National Labor Relations Board]. Representation proceedings, such as that now before us . . . are cognizable under Section 9 of the [National Labor Relations Act].

In a similar representation proceeding, [Cedars-Sinai Medical Center, 223 NLRB No. 57], the [National Labor Relations Board] held that interns, residents and fellows are not "employees" within the meaning of Section 2(3) of the [National Labor Relations Act]. This Board has found otherwise as to Section 701(3) of the State Act during the period that non-profit making hospitals were under its jurisdiction.

The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of the issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition. (Footnotes omitted.)

XIII

Defendant CIR filed an unfair labor practice charge with defendant NYSLRB on May 13, 1976, alleging that Albert Einstein had refused to bargain collectively with defendant CIR regarding wages, hours and other conditions of employment of the clinical fellows at

Albert Einstein. Defendant NYSLRB, citing its decision in Misericordia Hospital Medical Center, dismissed the unfair labor practice charges in regard to Albert Einstein on July 21, 1976.

XIV

Defendant CIR filed an unfair labor practice charge with defendant NYSLRB on July 15, 1976, alleging that defendant CIR was the bargaining representative for the interns, residents and fellows at Brookdale and that Brookdale had refused to bargain collectively with defendant CIR. By letter dated August 17, 1976, defendant NYSLRB notified defendant CIR that it had dismissed the Brookdale charge in view of defendant NYSLRB's decisions regarding Misericordia and Albert Einstein.

XV

Defendant CIR filed an unfair labor practice charge with defendant NYSLRB on July 15, 1976, alleging that defendant CIR was the bargaining representative for the interns, residents, chief residents and fellows at Joint Diseases Hospital and that Joint Diseases Hospital had refused to bargain collectively with defendant CIR. By letter dated August 17, 1976, defendant NYSLRB notified defendant CIR that it had dismissed the Joint Diseases Hospital charge in view of defendant NYSLRB's decisions regarding Misericordia and Albert Einstein.

XVI

Defendant CIR filed an unfair labor practice charge with defendant NYSLRB on July 26, 1976, alleging that defendant CIR was the bargaining representative for the interns, residents and fellows at Jewish-Hillside, and that Jewish-Hillside had refused to bargain collectively with defendant CIR. By letter dated August 25, 1976, defendant NYSLRB notified defendant CIR that it had dismissed the

Jewish-Hillside charge in view of defendant NYSLRB's decisions regarding Misericordia and Albert Einstein.

XVII

Defendant CIR filed an unfair labor practice charge, dated July 20, 1976, with defendant NYSLRB, alleging that defendant CIR was the bargaining representative for the interns, residents and fellows at Catholic Medical, and that Catholic Medical had refused to bargain collectively with defendant CIR.

XVIII

Defendant CIR filed an unfair labor practice charge with defendant NYSLRB on July 15, 1976, alleging that defendant CIR was the bargaining representative for the interns, residents, fellows, dental interns and dental residents at Beth Israel and that Beth Israel had refused to bargain collectively with defendant CIR in violation of the New York State Labor Relations Act. By letter dated August 17, 1976, defendant NYSLRB notified defendant CIR that it had dismissed the Beth Israel charge in view of defendant NYSLRB's decisions regarding Misericordia and Albert Einstein.

XIX

Defendant CIR, on August 30, 1976, commenced four separate actions against defendant NYSLRB in the New York Supreme Court for the County of New York. In one action (No. 15929/76), defendant CIR petitioned the State Court to review and annul the order of defendant NYSLRB dismissing the petition of defendant CIR to represent the interns, residents, and clinical fellows at Misericordia. In another action (No. 15928/76), defendant CIR petitioned the State Court to review and annul the order of defendant NYSLRB dismissing the unfair labor practice charge brought by defendant CIR regarding the alleged failure of Albert Einstein to bargain collectively with defendant CIR.

In a third action (No. 15931/76), defendant CIR petitioned the State Court to review and annul the order of defendant NYSLRB dismissing the unfair labor practice charges brought by defendant CIR regarding the alleged failure of Brookdale, Joint Diseases Hospital, and Jewish-Hillside to bargain collectively with defendant CIR. In a fourth action (No. 15930/76), defendant petitioned the State Court to review and annul the order of defendant NYSLRB dismissing the unfair labor practice charge brought by defendant CIR regarding the alleged failure of Beth Israel to bargain collectively with defendant CIR.

XX

Defendant NYSLRB, on September 8, 1976, moved in the State Court to dismiss the proceedings brought by defendant CIR for want of merit. Before the motions of defendant NYSLRB could be heard, Misericordia, Albert Einstein, Brookdale, and Jewish-Hillside moved for leave to intervene in the state proceedings. By a stipulation entered into in the State Court on September 9, 1976, Misericordia, Albert Einstein, Brookdale and Jewish-Hillside were granted leave to intervene.

XXI

On September 15 and 16, 1976, Misericordia, Albert Einstein, Brookdale and Jewish-Hillside filed petitions for removal of the proceedings in which they had intervened to the United States District Court for the Southern District of New York. Upon the application of defendant CIR, the United States District Court for the Southern District of New York issued orders on September 15, 1976, requiring Misericordia, Albert Einstein, Brookdale, and Jewish-Hillside to show cause why the proceedings should not be remanded to the State Court. By order dated September 28, 1976, the United States District Court

for the Southern District of New York granted the motions of defendant CIR to remand the proceedings to the State Court.

XXII

In opinions dated October 14, 1976, the New York Supreme Court granted the motions of defendant CIR to vacate the orders of defendant NYSLRB, and remanded the unfair labor practice charges and representation petition to defendant NYSLRB for further consideration. The New York Supreme Court entered judgment in Case Nos. 15928/76, 15929/76, 15930/76 and 15931/76 on October 22, 1976.

XXIII

The unfair labor practice charges and representation petition filed by defendant CIR with defendant NYSLRB, and the subsequent state court actions instituted by defendant CIR against defendant NYSLRB are an attempt to require defendant NYSLRB to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act.

XXIV

If defendant NYSLRB considers the matters remanded to it by order of the New York Supreme Court, it will be attempting to assert jurisdiction over and to regulate, and to consider matters which are preempted by the National Labor Relations Act and committed by Congress to the exclusive jurisdiction of the National Labor Relations Board.

XXV

The Orders of the New York Supreme Court requiring defendant NYSLRB to consider the unfair labor practice charges and representation petition filed with defendant NYSLRB by defendant CIR are invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

WHEREFORE, plaintiff requests this Court:

1. To issue a preliminary injunction enjoining defendant CIR, its agents, employees, attorneys and all persons in active concert and participation with it, pending the final hearing and determination of this action, from:

(a) in any manner requesting or attempting to require defendant to consider the unfair labor practice charges and representation petition remanded to defendant NYSLRB by the state court in Committee of Interns and Residents v. New York State Labor Relations Board (Supreme Court, New York County, Nos. 15928/76, 15929/76, 15930/76 and 15931/76).

(b) in any manner instituting or carrying forward any state court actions for the purpose of requiring defendant NYSLRB to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act;

(c) in any like or related manner attempting to require defendant NYSLRB to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act.

2. To issue a preliminary injunction enjoining defendant NYSLRB, its agents, employees, attorneys and all persons in active concert and participation with defendant NYSLRB, pending the final hearing and determination of this action, from:

(a) in any manner considering the unfair labor practice charges and representation petition remanded to defendant NYSLRB by the state court in Committee of Interns and Residents v. New York State

Labor Relations Board (Supreme Court, New York County, Nos.

15928/76, 15929/76, 15930/76 and 15931/76).

(b) in any like or related manner attempting to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act.

3. To enter, upon final disposition of the merits of this action, an order permanently enjoining defendants, their agents, employees, attorneys and all persons in active concert and participation with them from engaging in any of the above described conduct.

4. To issue a declaration of rights of the plaintiff.

5. To assess costs against defendants and to grant such other and further relief as the Court may deem proper.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated: Washington, D.C.
November 15, 1976

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,
Plaintiff,

v.

COMMITTEE OF INTERNS AND RESIDENTS,
and THE NEW YORK STATE LABOR RELATIONS
BOARD,
Defendants.

Civil Action No.

MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiff National Labor Relations Board moves this Court for a preliminary injunction enjoining defendant Committee of Interns and Residents from:

(a) in any manner requesting or attempting to require defendant New York State Labor Relations Board to consider the unfair labor practice charges and representation petition remanded to defendant New York State Labor Relations Board by the state court in Committee of Interns and Residents v. New York State Labor Relations Board (Supreme Court, New York County, Nos. 15928/76, 15929/76, 15930/76 and 15931/76.

(b) in any manner instituting or carrying forward any state court actions for the purpose of attempting to require defendant

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New York State Labor Relations Board to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act;

(c) in any like or related manner attempting to require defendant New York State Labor Relations Board to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act.

2. Plaintiff National Labor Relations Board also moves this Court for a preliminary injunction enjoining defendant New York State Labor Relations Board from:

(a) in any manner considering the unfair labor practice charges and representation petition remanded to defendant New York State Labor Relations Board by the state court in Committee of Interns and Residents v. New York State Labor Relations Board (Supreme Court, New York County, Nos. 15928/76, 15929/76, 15930/76 and 15931/76.

(b) in any like or related manner attempting to assert jurisdiction over, or to regulate, or to consider, matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act.

The grounds in support of its motion, as more fully set forth in the Complaint filed herewith (Civil Action No.) and in the memorandum submitted with this motion are that:

1. Orders of the New York Supreme Court, dated October 22, 1976 in Committee of Interns and Residents v. New York State Labor Relations Board (Supreme Court, New York County, Nos. 15928/76, 15929/76, 15930/76 and 15931/76 require defendant New York State Labor Relations Board to consider the unfair labor practice charges and representation

petition filed by defendant Committee of Interns and Residents with defendant New York State Labor Relations Board. Defendant Committee of Interns and Residents filed the charges and petition and instituted the subsequent state court actions in an attempt to require defendant New York State Labor Relations Board to assert jurisdiction over, or to regulate, or to consider matters which are within the exclusive jurisdiction of the National Labor Relations Board and governed exclusively by the National Labor Relations Act. If defendant New York State Labor Relations Board considers the petitions remanded to it by order of the state court, it will be asserting jurisdiction, regulating, and considering, matters which are preempted by the National Labor Relations Act and committed by Congress to the exclusive jurisdiction of the National Labor Relations Board. The Orders requiring defendant New York State Labor Relations Board to consider the petitions are, therefore, invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

2. Unless restrained by this Court, defendant Committee of Interns and Residents will continue to request and to attempt to require defendant New York State Relations Board to consider the charges and petition remanded by the New York Supreme Court to defendant New York State Labor Relations Board, and will continue to institute and carry forward state court actions in an attempt to require defendant New York Labor Relations Board to consider these and similar charges and petitions.

3. Unless restrained by this Court, defendant New York State Labor Relations Board will consider the charges and petition filed by defendant Committee of Interns and Residents and remanded to defendant New York State Labor Relations Board by the New York Supreme

Court in Committee of Interns and Residents v. New York State Labor Relations Board (New York Supreme Court, New York County, Nos. 15928/76, 15929/76, 15930/76 and 15931/76).

4. Such actions by defendants are or would be contrary to the public interest as set forth by Congress in the National Labor Relations Act and will result in irreparable injury to the rights of employers, employees and labor organizations under the National Labor Relations Act.

WHEREFORE, for the reasons set forth in the complaint and in this motion, together with the attached memorandum, plaintiff moves this Court for a preliminary injunction.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated: Washington, D.C.
November 15, 1976

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

National Labor Relations Board,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	Civ. 76-5119
	:	(CES)
Committee of Interns and Residents, and :	:	
The New York State Labor Relations Board,	:	<u>NOTICE OF MOTION</u>
	:	
Defendants.	:	

S I R S:

PLEASE TAKE NOTICE, that upon the attached affidavits of Edward T. Gluckmann and Murray A. Gordon, Esq., both verified on November 30, 1976, the answer of the defendant Committee of Interns and Residents ("CIR") dated November 30, 1976, the attached memorandum of law of the defendant CIR dated November 30, 1976, and all other papers heretofore filed herein and proceedings heretofore had herein, the undersigned will move this Court on December 10, 1976, at 9:30 A.M. in the forenoon of that day or as soon thereafter as this matter can be heard, at Room 301, at the United States Courthouse, Foley Square, City of New York, for summary judgment, pursuant to Rule 56(b), Fed. R. Civ. Pro., in favor of the defendant CIR and against the plaintiff National Labor Relations Board dismissing the complaint on the grounds that it fails to state facts sufficient to constitute a cause of action, together with costs of this action

against the plaintiff and in favor of the defendant CIR, and together with such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
National Labor Relations Board,

Plaintiff,

-against-

Civ. 76-5119
(CES)

Committee of Interns and Residents,
and The New York State Labor Relations
Board,

ANSWER

Defendants.
-----X

The defendant, Committee of Interns and Residents ("CIR"), by its attorneys, Murray A. Gordon, P.C., alleges as and for its answer to the complaint:

1. As to ¶I of the complaint, denies that the CIR has requested or attempted to require the New York State Labor Relations Board ("SLRB") to assert jurisdiction over, or to regulate, or to consider, matters which are governed exclusively by the National Labor Relations Act ("NLRA"), and further denies that the matters as to which the CIR has requested or attempted to require the SLRB to assert jurisdiction, regulate, or consider are invalid or without legal basis or within the exclusive jurisdiction of the National Labor Relations Board ("NLRB") or preempted by the NLRA.

2. As to ¶II of the complaint, denies that this Court has jurisdiction under 28 U.S.C. 1337 or 29 U.S.C. 151, et. seq.

3. Admits the allegations of ¶III of the complaint.

4. As to ¶IV of the complaint, admits the CIR is an unincorporated association organized and existing under the laws of the State of New York, and has its principal office and place of business in the County of New York of the State of New York and that its membership is composed of interns, residents, and clinical fellows (hereinafter sometimes collectively referred to as "house staff" or "house staff officers") in all the specialties and sub-specialties of authorized and accredited medical and dental internship, residency, and fellowship programs. The defendant CIR further alleges that the CIR is a labor organization representing approximately 6,000 house staff officers in the New York City metropolitan area employed and working as physicians, in training programs at municipal and voluntary non-profit hospitals. The organization has been functioning in the foregoing capacity since 1957. Prior to October 1, 1976, the CIR had collective bargaining contracts covering approximately 4,000 house staff officers at twelve voluntary non-profit hospitals under the aegis of the League of Voluntary Hospitals and Homes of New York ("the League"), seven independent non-profit voluntary institutions, and nine municipal hospitals whose house staff are on the New York City Health and Hospitals Corporation ("the HHC") payroll. In each hospital covered by an agreement with the CIR, it was recognized by the agreement and/or certified by the SLRB or NLRB, as the exclusive collective bargaining representative of the house staff.

5. Admits the allegations of ¶V of the complaint, and further alleges that the SLRB is the state agency with jurisdiction, pursuant to the New York State Labor Relations Act ("SLRA") (Labor Law, Article 20), to implement and enforce the lawful rights of employees to bargain collectively through labor organizations of their own choosing. SLRA §1(12) [Labor Law §701(12)] extends coverage of the SLRA to persons working or employed at non-profit voluntary health institutions. SLRA §13 [Labor Law §713] prohibits lockouts and strikes in such facilities, and SLRA §16 [Labor Law §716] provides for grievance and bargaining impasse mechanisms, including arbitration, to deal with hospital labor disputes. Prior to 1974 the SLRB held that house staff officers at voluntary hospitals were covered by the SLRA.

6. Admits the allegations of ¶VI of the complaint, and further alleges that the CIR represents and at all material times herein has represented the majority of the house staff employed by, and working and training at Misericordia, for the purpose of bargaining collectively as to the hours, wages, and terms and conditions of employment of that house staff.

7. Admits the allegations of ¶VII of the complaint, and further alleges that at all material times herein and until July 1, 1976, the CIR and Albert Einstein were parties to a collective bargaining agreement, a copy of which is attached as Exhibit 1, covering the hours, wages and terms and conditions of employment of the clinical fellows employed by, and working and training at Albert Einstein, and recognizing the CIR as the sole

and exclusive collective bargaining representative of clinical fellows, and the CIR has continued at all times on and after July 1, 1976, to represent the majority of said clinical fellows for the purpose of bargaining collectively as to the hours, wages, and terms and conditions of employment of that house staff.

8. Admits the allegations of ¶VIII of the complaint, and further alleges that at all material times herein and until October 1, 1976, the CIR and Brookdale, Joint Diseases Hospital, Jewish-Hillside, and Catholic Medical were parties to a collective bargaining agreement between the CIR and the League, a copy of which is attached as Exhibit 2, covering the hours, wages, and terms and conditions of employment of the house staff employed by, and working and training at said hospitals, and recognizing the CIR as the sole and exclusive collective bargaining representative of said house staff, and the CIR has continued at all times on and after October 1, 1976, to represent the majority of said house staff for the purpose of bargaining collectively as to the hours, wages, and terms and conditions of employment of said house staff.

9. Admits the allegations of ¶IX of the complaint, and further alleges that the CIR represents and at all material times herein has represented the majority of the house staff employed by, and working and training at Beth Israel, for the purpose of bargaining collectively as to the hours, wages, and terms and conditions of employment of that house staff, and that by certificate dated and issued January 26, 1976, the New York Region-

al Director of the NLRB certified the CIR as the sole and exclusive collective bargaining representative for the Beth Israel house staff after an election conducted by the NLRB at which a majority of that house staff voted in favor of representation by the CIR.

10. Admits the allegations of ¶¶X, and XII through XVIII of the complaint, and further alleges that prior to the time the CIR filed its petition with the SLRB to be certified as the exclusive collective bargaining representative of the house staff at Misericordia and prior to the time that the CIR filed its unfair labor practice charges with the SLRB against Albert Einstein, Brookdale, Joint Disease Hospital, Jewish-Hillside, Catholic Medical, and Beth Israel for their refusals to bargain collectively with the CIR as to the hours, wages, and terms and conditions of the employment of their house staff officers:

(i) prior to August 25, 1974, the NLRA excluded non-profit hospitals from its coverage [NLRA former Section 2(2); former 29 U.S.C. 2(2)];

(ii) the SLRB, likewise prior to August 25, 1974, held house staff officers at non-profit hospitals to be covered by the SLRA;

(iii) effective August 25, 1974, pursuant to Public Law 93-360, 93rd Cong., 2d Sess., 88 Stat. 395 ("PL 93-360") the exclusion of non-profit hospitals from the coverage of the NLRA was eliminated;

(iv) by decision and order dated March 19, 1976, in Cedars-Sinai, 223 NLRB No. 57, a copy of which is attached

as Exhibit 3, a majority of the NLRB (Member Fanning dissenting) found that the house staff at Cedars-Sinai Medical Center, "although they possess certain employee characteristics, are primarily students" and "not 'employees' within the meaning of Section 2(3) of the [NLRA]" and, therefore, dismissed the certification petition of the Cedars-Sinai House Staff Association;

(v) all house staff certification petitions filed with the NLRB have been dismissed by the NLRB on the same grounds as in Cedars-Sinai;

(vi) following Cedars-Sinai, and based expressly upon the decision of the NLRB in Cedars-Sinai:

(a) Misericordia refused to recognize or to bargain with the CIR although CIR represented the majority of the Misericordia house staff for purposes of collective bargaining;

(b) Albert Einstein terminated its collective bargaining agreement with the CIR, effective July 1, 1976, and refused to negotiate a new collective bargaining agreement with the CIR or otherwise to recognize the CIR as the collective bargaining representative of the Albert Einstein clinical fellows, and proceeded to fix the hours, wages, and terms and conditions of employment of the Albert Einstein clinical fellows unilaterally and contrary to the terms and conditions of the prior collective bargaining agreement with the CIR;

(c) Brookdale, Joint Diseases Hospital, Jewish Hillside, and Catholic Medical refused to negotiate a new collective bargaining agreement with the CIR upon the expiration of their League collective bargaining agreement with the CIR on October 1, 1976, and refused otherwise to recognize the CIR as the collective bargaining representative of the house staff at the aforesaid hospitals, and proceeded to fix the hours, wages, and terms and conditions of employment of said house staff unilaterally and contrary to the terms and conditions of their prior League collective bargaining agreement with the CIR; and

(d) Beth Israel refused to bargain with or otherwise recognize the CIR as the collective bargaining representative of the Beth Israel house staff, although the CIR had been certified by the NLRB, after an NLRB-conducted election, as the sole and exclusive collective bargaining representative of the Beth Israel house staff;

(vii) the CIR had no adequate or viable remedy before any tribunal other than to proceed before the SLRB as aforesaid; and

(viii) the NLRB had not rendered any determination, order, rule or regulation that the exclusion of house

staff officers from the coverage of the NLRA by the NLRB as afore-said had the effect or was intended to have the effect of ousting any state and local government, by reason of preemption, from regulating or exercising jurisdiction over house staff at voluntary hospitals in matters affecting collective bargaining and labor disputes.

11. As to ¶XI of the complaint, the CIR attaches, as Exhibit 4, a copy of the advisory opinion of the NLRB in response to the request therefor by Misericordia, and respectfully refers the Court to that advisory opinion in lieu of the allegations of said ¶XI, and further alleges that since Sections 8, 9 and 10 of the NLRA [29 U.S.C. 158-160] all refer to the rights, duties, and status of employees and their labor organizations and the NLRB has held house staff officers not to be employees and their associations not to be labor organizations within the meaning of the NLRA, the advisory opinion of the NLRB in Misericordia necessarily implicated that the NLRB did not claim or assert jurisdiction over operations of a voluntary hospital with respect to disputes with its house staff.

12. Further as to ¶XII of the complaint, the CIR attaches as Exhibit 5 a copy of the decision and order of the SLRB in Misericordia, and respectfully refers the Court to that decision and order in lieu of the allegations of said ¶XII.

13. Further as to ¶XIII of the complaint, the CIR attaches as Exhibit 6 a copy of the SLRB determination of July 21, 1976, in Albert Einstein, and respectfully refers the Court to that determination in lieu of the allegations of said ¶XIII.

14. Further as to ¶XIV of the complaint, the CIR attaches as Exhibit 7 a copy of the SLRB determination of August 17, 1976, in Brookdale, and respectfully refers the Court to that determination in lieu of the allegations of said ¶XIV.

15. Further as to ¶XV of the complaint, the CIR attaches as Exhibit 8 a copy of the SLRB determination of August 17, 1976, in Joint Diseases Hospital, and respectfully refers the Court to that determination in lieu of the allegations of said ¶XV.

16. Further as to ¶XVI of the complaint, the CIR attaches as Exhibit 9 a copy of the SLRB determination of August 25, 1976, in Jewish-Hillside, and respectfully refers the Court to that determination in lieu of the allegations of said ¶XVI.

17. As to the allegations in ¶XVII of the complaint, the CIR alleges further, on information and belief, that the SLRB dismissed and denied the CIR unfair labor practice charges against Catholic Medical on the same grounds as the SLRB dismissal and denial of the other unfair labor practice charges as aforesaid.

18. Further as to ¶XVIII of the complaint, the CIR attaches as Exhibit 10 a copy of the SLRB determination of August 17, 1976, in Beth Israel, and respectfully refers the Court to that determination in lieu of the allegations of said ¶XVIII.

19. As to the allegations in ¶XIX of the complaint, the CIR attaches hereto as Exhibits 11 to 14, respectively, copies of the petitions filed in the New York State Supreme Court, New York County, to review the SLRB determinations in Misericordia (Exhibit 11), Albert Einstein (Exhibit 12), Brookdale, Joint

Diseases, Jewish-Hillside, and Catholic Medical (Exhibit 13), and Beth Israel (Exhibit 14), and the Court is respectfully referred to said petitions in lieu of the allegations with respect thereto in said ¶XIX.

20. Admits the allegations in ¶XX of the complaint, except that the CIR attaches as Exhibit 15 a copy of the SLRB pleading interposed by the SLRB in the state court proceedings and respectfully refers the Court to said pleading in lieu of the allegations with respect thereto in said ¶XX, and the CIR further alleges that Beth Israel also moved to intervene and by stipulation on September 9, 1976, was allowed to intervene in the aforesaid state court proceedings.

21. Admits the allegations in ¶XXI of the complaint, except that: (i) the CIR attaches as Exhibits 16 through 19 copies of the ex parte petitions of Misericordia (Exhibit 16), Albert Einstein (Exhibit 17), Brookdale (Exhibit 18-19), and Jewish-Hillside (Exhibit 18-19) on September 15, 1976, and September 16, 1976, removing the state court proceedings affecting those hospitals to this Court, and respectfully refers the Court to said removal petitions in lieu of the allegations with respect thereto in said ¶XXI; and (ii) the CIR, further, attaches as Exhibit 20 a copy of the memorandum and order of this Court dated September 23, 1976, granting the motion of the CIR to remand the proceedings, removed as aforesaid, to the New York State Supreme Court, and respectfully refers the Court to said memorandum and order in lieu of the allegations with respect thereto in said ¶XXI.

22. With respect to the allegations in ¶XXII of the complaint, the CIR: (i) attaches as Exhibit 21 a copy of the decision of Mr. Justice Gellinoff dated October 14, 1976, at Special Term, Part 1, Supreme Court, State and County of New York, and attaches as Exhibit 22 a copy of the judgments of the aforesaid Court dated October 22, 1976, vacating the prior determinations of the SLRB hereinbefore referred to and remanding the CIR certification petition and unfair labor practice charges to the SLRB for further consideration, and respectfully refers the Court to said decision and judgments in lieu of the allegations with respect thereto in said ¶XXII; and (ii) further alleges that no appeal was filed by the SLRB from the order of the New York State Supreme Court, that appeals were filed by Misericordia, Albert Einstein, Brookdale, Joint Diseases, Jewish-Hillside and Beth Israel to the Appellate Division, First Department, New York State Supreme Court, that said appeals are presently pending and have been scheduled for the January 1977 Term of the aforesaid Appellate Division, and that the SLRB has been stayed by order of the Appellate Division, dated November 18, 1976, from any further proceedings with respect to the matters raised as aforesaid in the state court proceedings pending the hearing and determination of the aforesaid appeals.

23. Denies each and every allegation contained in ¶XXIII of the complaint.

24. Denies each and every allegation contained in ¶XXIV of the complaint.

25. Denies each and every allegation contained in ¶XXV of the complaint.

AS AND FOR A FIRST FULL
AND SEPARATE DEFENSE.

26. 28 U.S.C. 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

27. This action is brought by plaintiff to enjoin proceedings now pending before the duly authorized agency and courts of the State of New York with respect to the matters pending as aforesaid before said agency and courts without just cause or reason therefor and in violation of the provisions of 28 U.S.C. 2283 in that none of the exceptions therein referred to are here applicable.

28. The matters pending as aforesaid before the SLRB and courts of the State of New York have not been preempted by the NLRA nor have they been lawfully or validly preempted by the NLRB so that no just cause or basis exists to invoke or apply herein the NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), exception to the proscription contained in 28 U.S.C. 2283 against federal jurisdiction to enjoin a state action.

29. The pending state court proceedings involve the same issue of preemption as is here raised by the plaintiff. The CIR invited the NLRB and afforded the NLRB the opportunity to intervene and participate fully as an interested party in the state court proceedings by telegram dated September 3, 1976, a copy of

which is attached as Exhibit 23, in order to obtain prompt judicial review and disposition of the aforesaid issue. By written reply dated September 8, 1976, a copy of which is attached as Exhibit 24, the NLRB General Counsel notified the CIR that the NLRB declined to participate in the state court proceedings.

30. The courts of the State of New York are authorized by law, and are otherwise able and competent, fairly and fully to hear and determine the issue of preemption and all of the other matters related and ancillary thereto raised by the plaintiff here, and any final determination thereof by those state courts is subject to review and consideration by the United States Supreme Court pursuant to applicable provisions of law.

31. The courts of the State of New York have, as indicated in ¶22 hereof, stayed and enjoined any proceedings by or before the SLRB with respect to the CIR certification petition and unfair labor practice charges hereinbefore referred to until the hearing and determination of appeals pending before the Appellate Division, First Department, as aforesaid. There is no actual or threatened irreparable injury or harm presently or imminently incurred by the NLRB warranting the injunctive relief sought by the plaintiff herein.

32. Pursuant to 28 U.S.C. 2283 and the principles of comity due and owing to the courts of the State of New York in the circumstances which here obtain, and by reason of the absence of any present or imminent irreparable injury or harm to any cognizable interest of the plaintiff, the complaint fails to state a good or sufficient cause of action.

AS AND FOR A SECOND FULL
AND SEPARATE DEFENSE

33. On or about November 8, 1976, a majority of the NLRB, Member Fanning dissenting, rendered its revised Decision and Order in Kansas City General Hospital and Medical Center, 225 NLRB No. 14A, a copy of which is attached as Exhibit 25. The NLRB there decided, sua sponte, that it was the intention of the majority of the NLRB, in the house staff decisions of the NLRB hereinbefore referred to in ¶10(iv), (v) hereof, to find and determine that state jurisdiction over residents, interns, and fellows has been preempted by the Act, that each of the States has been precluded "from exercising their power to regulate in this area," and "that to extend them [house staff officers] collective bargaining rights would be contrary to that very [national labor] policy."

34. Prior to the revised determination of the NLRB in Kansas City General Hospital, the NLRB had not announced any decision or determination of the issue of preemption in house staff matters in any case, order, rule, or regulation of the NLRB.

35. Upon information and belief, the revised determination of the NLRB in Kansas City General Hospital was made without the benefit of any full or complete opportunity for the argument or other presentation by any party in that proceeding or any other proceeding before the NLRB on the issue of preemption in house staff matters.

36. The NLRA does not expressly or impliedly provide, and it was not the purpose or intention in the enactment of

PL 93-360 to provide that house staff officers at voluntary hospitals be excluded from the coverage of the NLRA and also excluded from state and local jurisdiction, regulation, or control as to the organization, collective bargaining, and labor disputes of house staff officers.

37. The NLRA does not expressly or impliedly provide that the NLRB shall have the authority or discretion to exclude from the coverage of the NLRA any class of employees, including house staff officers, not otherwise expressly or impliedly excluded from the coverage of the Act and also to exclude any such class of employees from state and local jurisdiction, regulation, or control as to the organization, collective bargaining, and labor disputes of such a class of employees, including house staff officers.

38. Section 14(c) (1) of the NLRA [29 U.S.C. 164(c) (1)] expressly provides that the NLRB shall have the authority and discretion to decline to assert jurisdiction over any labor dispute involving any class or classes of employers where the NLRB considers the effect of such dispute not to have a substantial effect on commerce and does not provide the NLRB with any like authority or discretion to exclude from the coverage of the NLRA any class or classes of employees, including house staff officers.

39. Section 14(c) (2) of the NLRA [29 U.S.C. 164(c) (2)] expressly provides that where the NLRB shall exercise its authority and discretion to exclude any class or classes of labor disputes from the coverage of the NLRA, pursuant to Section 14(c) (1) as aforesaid, such action by the NLRB shall thereby authorize

any state or local government to regulate or exercise jurisdiction with respect to such class or classes of labor disputes.

40. The NLRA does not expressly or impliedly provide, and it was not the purpose or intention of the Congress in the enactment of PL 93-360 to provide for the preemption of the existing state or local legislation specifically and directly applicable to labor relations in voluntary hospitals such as New York Labor Law Article 20.

41. It is contrary to, and in direct violation and derogation of the purpose and intention of the Congress in the enactment of PL 93-360 to exclude house staff officers from all jurisdiction, regulation or control by federal, state, or local government, as to the organization, collective bargaining, or labor disputes, including recognition or impasse strikes, of house staff at voluntary hospitals, and the action of the NLRB and the relief sought by the plaintiff here to oust state and local government from jurisdiction, regulation, or control of such house staff matters is not based upon or justified by any national labor policy.

42. The complaint fails to state a good and sufficient cause of action, and should therefore be dismissed, for the reasons hereinbefore set forth, in that the proposed ouster by the NLRB of local governments, including the State of New York, from exercising jurisdiction over, and regulation and control of the organization, collective bargaining, and labor disputes of house staff officers held by the NLRB not be covered by the NLRA, is:

- (i) arbitrary, capricious, an abuse of discretion, unreasonable, and otherwise not in accordance with law;
- (ii) in excess of the statutory jurisdiction, authority, or limitations prescribed by the NLRA;
- (iii) short of statutory right prescribed by the NLRA;
- (iv) clearly and directly contrary to and in violation of the jurisdiction, authority, limitations, prohibitions, proscriptions, and rights prescribed by the NLRA; and
- (v) without observance of procedure required by law.

AS AND FOR A THIRD FULL
AND SEPARATE DEFENSE

43. The NLRA does not expressly or impliedly preempt or oust, and the NLRB has not preempted or ousted state or local governments from exercising jurisdiction, regulation or control of labor relation matters affecting classes of employees expressly excluded from the coverage of the NLRA, such as public employees, agricultural and domestic workers, self-employed persons, and independent contractors, as provided in Section 2(2)(3) of the NLRA [29 U.S.C. §152(2)(3)]. No just or sufficient cause or reason exists for treating house staff officers differently in this respect from all other excluded employees or classes of employees, and to do so, as is sought by the plaintiff herein, would be so arbitrary and unreasonable as to be in violation of and contrary to the Due Process Clause of the Fifth Amendment of the United States Constitution.

44. The NLRA excludes all employees of public employers, including house staff officers employed at public institutions, from its coverage pursuant to Section 2(3) of the NLRA [29 U.S.C. 152(3)]. The NLRA does not expressly or impliedly preempt or oust, and the NLRB has not preempted or ousted state or local governments from exercising jurisdiction, regulation or control of labor relations matters affecting such house staff officers at public institutions. House staff officers employed at New York State public institutions are, and have been authoritatively held to be covered by the provisions of the law of the State of New York applicable to the organization, collective bargaining, labor relations, and labor disputes of New York State public employees. Similarly, house staff officers employed at the HHC and other New York City public health care institutions, all of whom are represented by the CIR, are, and have been authoritatively held to be covered by the provisions of the New York City Collective Bargaining Law applicable to the organization, collective bargaining, labor relations, and labor disputes of New York City public employees. No just or sufficient cause or reason exists for treating house staff officers at voluntary hospitals differently from all other house staff officers at public institutions in the foregoing respect, and to do so, as is sought by the plaintiff herein, would be so arbitrary and unreasonable as to be in violation of and contrary to the Due Process Clause of the Fifth Amendment to the United States Constitution.

45. The action of the NLRB as hereinbefore set forth, and the relief sought by the NLRB, purport and threaten to deny to each and every State and local government of the United

States, the power, authority, and/or jurisdiction to regulate or otherwise deal effectively with the organization of house staff officers at voluntary hospitals for collective bargaining purposes, the conduct of collective bargaining with, by, or on behalf of house staff officers, labor disputes involving house staff officers, and/or strikes by house staff officers. At the same time, the NLRB has failed, neglected, and refused to assert or exercise NLRA coverage over the aforesaid matters. As a consequence of the foregoing, and if the relief sought by the NLRB herein is granted, the States and the people thereof will be caused to be without any effective control or regulation of matters directly and substantially affecting their lives, safety and welfare, in violation of the powers reserved to the States and to the people thereof by the Tenth Amendment to the United States Constitution.

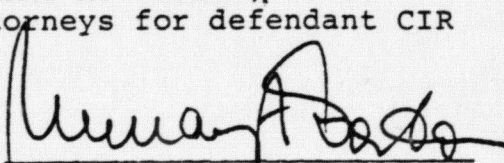
46. The complaint fails to state a good and sufficient cause of action, and should therefore be dismissed, for the reasons hereinbefore set forth, in that the proposed ouster of state and local governments, including the State of New York, by the NLRB from exercising jurisdiction, regulation, or control of the organization, collective bargaining, and labor disputes of house staff officers held by the NLRB not to be covered by the NLRA, is contrary to constitutional right, power, privilege, and immunity.

WHEREFORE, the defendant CIR respectfully prays that the complaint be dismissed, that the prayer for relief of the plaintiff and the complaint be denied, and that judgment be

entered herein in favor of the defendants and against the plaintiff, with the costs of the action allowed to the defendant CIR, together with such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

MURRAY A. GORDON, P. C.
Attorneys for defendant CIR

By: 

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Dated: New York, New York
November 30, 1976.

-----X
NATIONAL LABOR RELATIONS BOARD,
Plaintiff,
-against-
COMMITTEE OF INTERNS AND
RESIDENTS, AND THE NEW YORK STATE
LABOR RELATIONS BOARD,
Defendants.
-----X

76 Civ. 5119

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Plaintiff National Labor Relations Board ("NLRB" or "the Board") has brought this action in federal court seeking to enjoin defendant Committee of Interns and Residents ("CIR") from attempting to require co-defendant New York State Labor Relations Board ("SLRB") to assert jurisdiction over any of the unfair labor practice charges and the representation petition filed by the CIR against various voluntary, non-profit hospitals in the New York City area. The CIR is a labor organization whose members are physicians working in training programs as interns, residents and clinical fellows ("housestaff"), in these hospitals. Plaintiff also seeks to enjoin defendant SLRB from considering, or in any way asserting jurisdiction over, these labor disputes. Plaintiff seeks this relief on the ground that this area of labor relations has been preempted by the National Labor Relations Act, 29 U.S.C.

§§151 et seq ("NLRA" or "the Act") and is within the exclusive jurisdiction of the NLRB. Plaintiff also seeks a declaratory judgment that these matters are preempted by the aforementioned federal statute.

Defendant CIR has cross-moved for summary judgment alleging that this court lacks jurisdiction over the subject matter of this action and that, on the merits, the NLRA has not preempted this area of labor relations. Defendant SLRB has taken no position, but has informed the Court that it will comply with the judgment of this Court or any other court of competent jurisdiction.^{1/}

Factual Background

The question presented by this action is whether house-staff physicians, working and training in voluntary non-profit hospitals in New York State, may be covered under the New York State Labor Relations Act, Labor Law §700 et seq (McKinney's 1965) ("SLRA"), or whether they are covered exclusively by the NLRA.

Section 701(12) of the Labor Law extends the coverage of the SLRA to "any person employed or permitted to work by or at a non-profitmaking hospital or residential care center." The SLRB has interpreted this to include housestaff. Long Island College

^{1/} Albert Einstein College of Medicine and Misericordia Hospital Medical Center moved to intervene as plaintiffs under Rule 24(b) of the Federal Rules of Civil Procedure. On December 13, 1976, this Court denied the motion to intervene, but granted leave for the hospitals to appear as amici curiae. The Court has also allowed the Association of American Medical Colleges to file a brief as amicus curiae.

Hospital, 33 SLRB No. 32 (1967); Brooklyn Eye and Ear Hospital, 32 SLRB No. 21 (1966). For a considerable period of time, the SLRB and hospitals have recognized the CIR (as provided by §705 of the SLRA), as the exclusive bargaining representative of house-staff physicians in a substantial number of voluntary, non-profit hospitals in the New York City area. During this time, the CIR has negotiated collective bargaining agreements on behalf of its members with these hospitals.

Prior to 1974, there was no conflict between this coverage under the SLRA and the NLRA, because the NLRA had excluded from its definition of "employer" any "corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" (repealed 29 U.S.C. §152(2)). However, effective August 25, 1974, Congress deleted this exclusion from §152(2), and extended the coverage of the NLRA to any "health care institution" which is defined as

...any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person...29 U.S.C. §152(14).

There appears to be no dispute that this amendment brought labor relations between voluntary, non-profit hospitals and their "employees" as defined in Section 2(3) within the jurisdiction of the NLRA. This by no means, though, disposes of the question of whether housestaff physicians are within the exclusive jurisdiction of the NLRA.

The NLRB first considered the situation of housestaff in Cedars-Sinai Medical Center, 223 NLRB No. 57, 91 LRRM 1398

(March 19, 1976), and concluded (with Member Fanning dissenting at length) that

...interns, residents, and clinical fellows, although they possess certain employee characteristics, are primarily students. Accordingly...we conclude that the interns, residents and clinical fellows...are not "employees" within the meaning of Section 2(3) of the Act.
Id. at 3.

In light of this conclusion, the NLRB found that the Cedars-Sinai Housestaff Association, which was comprised solely of housestaff physicians, was not a labor organization within the meaning of §152(5) of the NLRA. The NLRB then dismissed the Association's petition to certify a bargaining unit of housestaff physicians on the ground that it presented "no question affecting commerce...concerning the representation of 'employees' of the Employer within the meaning...of the Act" 223 NLRB No. 57 at 8. This view was adhered to without modification in a number of subsequent cases involving housestaff in hospitals around the country.^{2/}

Following this decision, Misericordia Hospital Medical Center refused to recognize or bargain with the CIR, so the CIR petitioned the SLRB for certification based on the CIR's claim that it represented a majority of the housestaff at Misericordia. In addition, other hospitals, where the CIR had been recognized and

^{2/} Wayne State University, 226 NLRB No. 168 (1976); Buffalo General Hospital, 224 NLRB No. 17, 92 LRRM 1197 (1976); St. Clare's Hospital, 223 NLRB No. 163, 92 LRRM 1001 (1976); University of Chicago, 223 NLRB No. 154, 92 LRRM 1039 (1976); St. Christopher's Hospital, 223 NLRB No. 58, 91 LRRM 1417 (1976).

certified as the exclusive bargaining representative for house-staff, also refused to bargain with the CIR, so the CIR filed with the SLRB unfair labor practice charges against these hospitals. In all these cases, the hospitals refused to recognize or bargain with the CIR because of the NLRB's ruling in Cedars-Sinai. Further, the hospitals objected to the proceedings before the SLRB on the ground that the 1974 health care amendments to the NLRA had preempted state regulation of labor relations in the health care field.

While these proceedings were pending before the SLRB, the NLRB issued its decision in Kansas City General Hospital, 225 NLRB No. 14 (June 24, 1976), in which it reiterated the Cedars-Sinai finding that housestaff physicians are not "employees" within the meaning of the NLRA, and concluded that the hospital there involved was

...not an "employer" within the meaning of Section 2(2) of the Act for the purposes of any disputes relating to such personnel.

In the CIR proceedings before the SLRB, the jurisdictional issue was briefed, and on July 14, 1976, the SLRB dismissed the representation petition stating:

The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of this issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Misericordia Hospital Medical Center, 39 SLRB No. 32.

The unfair labor practice charges against the other hospitals were also dismissed for the same reason .

The CIR then commenced a number of Article 78 proceedings (New York CPLR §7801 et seq (McKinney's 1963)) in New York State

Supreme Court asking the Court to vacate the SLRB's dismissals and order the SLRB to assert jurisdiction over the CIR's claims. Initially, the SLRB alone was named as defendant in these state court actions. However, a number of hospitals moved to intervene as defendants and did so by stipulation of the parties. Thereafter, the intervenors sought to remove several of the actions to federal court. Their petitions were denied on September 28, 1976 by Judge Brieant of this Court on the ground that the federal preemption question was not presented as part of the plaintiff's claim in state court, but only appeared as a defense, so there was no federal jurisdictional basis for removal. 28 U.S.C. §1441.

Upon remand, Justice Gellinoff of the New York State Supreme Court vacated the SLRB's determinations dismissing the CIR's representation petition and unfair labor practice charges, and remanded them to the SLRB for further consideration. Justice Gellinoff concluded that, in light of 1) the NLRB's finding in Cedars-Sinai concerning the "employee" status of housestaff physicians, 2) its further determination in Kansas City that hospitals were not "employers" within the meaning of the NLRA for the purpose of disputes relating to housestaff, and 3) the absence of any language either in the NLRA or the Board's decision indicating the intention that "these vital members of the hospital's working staff should be bereft of any labor regulation at all,"

...the jurisdiction of respondent State Board over disputes between petitioner and the intervening hospitals is unaffected by the 1974 amendments to the National Labor Relations Act, and therefore the Board retains the same jurisdiction it previously possessed. 93 LRRM 2540 (October 14, 1976).

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In response to Justice Gellinoff's decision, the NLRB sua sponte reconsidered and revised its opinion in Kansas City. In its revised order of November 8, 1976, the Board (Member Fanning dissenting) announced that it would delete the finding in its original decision that the hospital was not an "employer" under the NLRA for the purposes of any disputes relating to housestaff, and that it relied simply on the Cedars-Sinai holding that housestaff are not "employees" under the NLRA as grounds for dismissing the union's petition. The Board then directly addressed the preemption question presented in the instant case, and concluded that there was federal preemption of labor relations in the health care field. The Board stated:

Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5 (footnotes omitted).

This action was commenced by the NLRB on November 16, 1977.

The Court has been informed that there is no other federal action

pending in which the NLRB's ruling on federal preemption in Kansas City is directly being reviewed (Transcript of December 10, 1976 hearing pp. 55-6).

An appeal from Justice Gellinoff's decision was taken by the defendant hospitals and was pending before the New York State Supreme Court, Appellate Division, when this federal action was filed. However, in light of the Board's revised decision in Kansas City, several of the hospitals also moved to reargue before Justice Gellinoff. On January 6, 1977, the motion was granted and Justice Gellinoff vacated his previous decision and dismissed the CIR's petitions on the ground that he was bound by the Board's subsequent ruling on preemption. On January 20, 1977 Justice Gellinoff denied the CIR's request that he reconsider his January 6, 1977 ruling. The Court has been informed that the CIR has filed a notice of appeal from the dismissal, and that the Appellate Division has provided for an expedited briefing schedule and oral argument in early March (January 26, 1977 letter of Daniel Riesel representing amicus Albert Einstein College of Medicine).

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. §1337 as the action arises under the NLRA, 29 U.S.C. §151 et seq. The CIR has asserted, however, that this Court lacks subject matter jurisdiction on the grounds that 28 U.S.C. §2283 bars this Court from granting either the injunctive or declaratory relief sought and that no exception to §2283 is applicable here. The CIR further contends that this Court is barred by principles

of federalism and equity from granting the injunctive relief sought.

First, we agree that the relief sought in this case does fall within the prohibition of §2283 which states:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Here, defendant CIR initiated state court proceedings, long before this case was filed, in which it sought review of the SLRB's dismissal of the CIR's representative petition and unfair labor practice charges and a determination that the SLRB did have jurisdiction over the CIR's labor disputes with the hospitals. These state court proceedings are still pending -- at this point at the appellate level -- where the trial court's dismissal of the CIR's petitions is under review.

The direct impact of this court issuing the injunction sought would be to restrain the CIR from continuing to assert its rights in these state court proceedings. This puts the injunctive relief sought within the strictures of §2283. Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970); Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1940). Section 2283 applies as well to the declaratory relief sought. Thiokol Chemical Corp. v. Burlington Industries, 448 F. 2d 1328 (3d Cir.) cert. denied 404 U.S. 1019 (1971); accord, Samuels v. Mackell, 401 U.S. 66 (1971); Gajon Bar & Grill v. Kelly, 508 F.2d 1317 (2d Cir. 1974).

There are a number of exceptions to the prohibition set forth in §2283, three of which appear in the statute itself. None of these is urged by the parties as having application here. However, plaintiff contends that the exception developed in NLRB v. Nash-Finch Co., 404 U.S. 138 (1971) does apply in this case. The CIR disagrees.

In Nash-Finch, the Supreme Court held that the NLRB had "implied authority...in spite of the command of §2283, to enjoin state action where its federal power preempts the field" (404 U.S. at 144).

In Nash-Finch, as here, no proceedings were pending before the Board involving the activities which the Board sought to enjoin the state court from regulating. Instead, the Board's claim there, as here, was based on its general assertion that the conduct which the state sought to regulate was governed exclusively by the NLRA. In a procedural context, then, very similar to that present here, the Supreme Court in Nash-Finch found that the Board had the implied authority to seek injunctive relief against preempted state action.

The CIR claims that the Nash-Finch exception of §2283, however, should not apply in the instant case because here the existence of federal preemption is the heart of the controversy between the parties, while in Nash-Finch, according to the CIR, preemption was "posited and apparently not contested" (CIR Memorandum p. 15). While Justice Douglas writing for the majority, did find in Nash-Finch that "the exclusiveness of the federal domain is clear," (404 U.S. at 147) we do not think that the Court's holding depended on the preemption issue being uncontested.

In fact, judging from comments made by Justice White in his dissent, this issue was not uncontested (Id. at 154-156).

The Supreme Court's analysis in Nash-Finch began with its finding that the purpose of the NLRA

...was to obtain "uniform application" of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." Id. at 144 .

The Court recognized the special position of the NLRB, as "the sole protector of the 'national interest'" (Id. at 145), as defined by the NLRA, and concluded that an exception to §2283 existed for the NLRB when it was acting in its capacity as "protector" of the national interest, and seeking to protect federal rights and policies from improper regulation by the state. The §2283 exception was proper under these circumstances, because:

The purpose of §2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in Leiter [Minerals, Inc. v. United States, 352 U.S. 221 (1957)] that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation. The frustration of superior federal interests by the general language of §2283 cannot reasonably be imputed. Id. at 145 (citations omitted).

We think this rationale applies as much where federal preemption may have been conceded as where it is contested by the parties, and ultimately found by the court. Once the court determines that the Board's preemption claim is not frivolous (as it clearly is not here), it may entertain the Board's action

seeking injunctive relief under the Nash-Finch exception to §2283's jurisdictional bar.^{3/}

Accordingly, we find that the exception to §2283 articulated in Nash-Finch applies in the instant case, and this court has jurisdiction over the subject matter of this action.

The CIR further argues that we should decline to exercise our jurisdiction because "considerations of federalism, comity and the adequacy of state remedies mandate equitable restraint" (CIR Memorandum p. 16).

The Supreme Court has indicated that, even where there is an exception to the anti-injunction statute, the principles of equity, comity and federalism must still be considered by a federal court when asked to enjoin a state court proceeding. Mitchum v. Foster, 407 U.S. 225 (1972). The weight which these elements must be given when the state proceeding is criminal has been extensively analyzed by the Court in Younger v. Harris, 401 U.S. 37 (1971) and

^{3/} The concerns expressed by Justice White, dissenting in Nash-Finch, do not militate against this conclusion. He urged that if, contrary to his view, the Board did have power to seek an injunction to prevent state interference in activities preempted by federal law, it should not be able to obtain this relief simply by "the mere conclusory allegation that such rights are 'arguably' protected" (Id. at 154), but should be entitled to the relief only if it "persuades a federal court that the state decree is actually interfering with rights protected by federal law" (Id. at 156). Thus even the dissent envisioned the jurisdictional doctrine expressed in Nash-Finch as applying where the preemption issue was not initially settled, and simply argued that the higher standard of proof was necessary in order for the court to grant the injunctive relief sought.

its companion cases. Concerning the application of the Younger doctrine to state civil cases, Justice Stewart, concurring in Younger, stated:

Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases....The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.
401 U.S. at 55 n. 2 (citations omitted). '

In Lynch v. Household Finance Corp., 405 U.S. 538 (1972), Justices White and Blackmun and Chief Justice Burger indicated, in a dissent addressing a question not reached by the majority, that they viewed the Younger considerations as "equally applicable where state civil litigation is in progress" (Id. at 561). However, most recently in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court, including the three dissenters in Lynch, specifically declined to make a "general pronouncement upon the applicability of Younger to all civil litigation" (Id. at 607). In Huffman, the federal court had been asked to enjoin a pending state civil nuisance proceeding which had been brought by the state. The Supreme Court emphasized the fact that the state had brought the state court action and that that action was "both in aid of and closely related to criminal statutes" (Id. at 604). Under these circumstances, the Court concluded that to disrupt the state action would interfere with the "State's efforts to protect the very interests which underlie its criminal law" (Id. at 605), and that the affront to the state was just as great as it would be if the

state proceeding had been criminal. Thus the Court held that the principles of federalism and comity expressed in Younger applied and dictated that the federal court decline to exercise its jurisdiction.

In the instant case, not only is there no state criminal proceeding involved, but the pending state civil action was brought by a private party on the basis of the state labor statutes, and can in no way be considered to be either "in aid of " or "closely related to" any criminal statute. Thus we conclude that the Younger principles, even as extended by Huffman, do not apply with such force in this case. Vail v. Quinlan, 406 F.Supp. 951 (S.D.N.Y.), prob. juris. noted sub nom Juidice v. Vail, ___ U.S. ___, 96 S.Ct. 3164 (1976).

To determine whether the principles of comity and federalism should cause us to decline to assert jurisdiction here, we must evaluate the competing state and federal interests, in light of the ground asserted in support of intervention in the state proceedings. Perez v. Ledesma, 401 U.S. 82 (1971). Here, plaintiff asserts a claim of federal preemption. Recently, a three-judge court in Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976), appeal docketed, 45 U.S.L.W. 3451 (December 24, 1976), analyzed the considerations of comity and federalism presented when a federal plaintiff asserts a preemption, rather than a constitutional, claim as the ground for federal intervention in state proceedings and concluded that "traditional notions of federal-state relations, rather than requiring abstention, impel this court to intervene" (Id. at 1374).

The Maher court indicated that, while the doctrines of comity and federalism counsel a federal court to give proper deference to the independent sovereignty of the individual states, this deference should be tempered by recognition of the particular areas of expertise of the federal and state courts. A claim of preemption requires the court to determine, in the absence of specific direction, the Congressional intent behind a particular statute. This is a task of federal statutory interpretation. Because the federal courts have primary competence in deciding questions of federal law, preemption thus presents an issue which is within the sphere of special federal judicial competence. It would be inappropriate for a federal court to decline jurisdiction in these circumstances.

The court in Maher also determined that the federalism interest of avoiding any interference with pending state court proceedings was not compelling where the federal injunction was based on preemption, rather than constitutional, grounds. In the case of preemption, the intrusion flowed from and expressed a Congressional determination that the area was not within state power. Thus, as the court stated:

[a] finding of preemption...is a finding that the intrusion has already occurred...it would be a finding that for reasons of national policy Congress had intended that the pending state court actions should not have been instituted. It would be a finding concerning the validity of the proceeding itself, not just concerning the constitutionality of the particular statute or its particular application. While this would clearly be an intrusion into a legitimate sphere of state interest, it would be an intrusion accomplished at the direction of Congress, and one which is clearly within Congress' power to direct. 414 F.Supp. at 1375 .

An additional factor militates against declining jurisdiction in the instant case: here the NLRB is asserting the claim of federal preemption. We think that the same considerations which caused the Supreme Court to develop an exception to §2203 for the federal government and its agencies in Leiter and Nash-Finch, and to conclude that for these federal entities, "access to federal courts is 'preferable in the context of healthy federal-state relations'" (404 U.S. at 147 citing Leiter at 226), support the exercise of federal jurisdiction here.

Thus we have concluded that the concerns addressed by the principles of comity and federalism weigh in favor of, not against, our exercising jurisdiction.

Nor does the CIR's assertion that plaintiff has an adequate remedy in the state courts change this balance. It would appear that the pending state proceedings offer adequate opportunity for the NLRB to raise fully its preemption claim. However, as discussed above, a finding that federal law preempts application of any state regulation amounts to a finding that the state action should not have been brought. The NLRB is not a party to the state actions and specifically declined to join them, though invited to by the CIR (Defendant CIR's Answer, Exhibits 23 and 24). Rather than finding this choice improper, we think it would be somewhat anomalous to require the NLRB to submit to the jurisdiction of a state court when the basis of its claim is that the state does not have any jurisdiction over the subject matter.

Further, we think that the preference for a federal forum expressed in Nash-Finch weighs strongly against our requiring the

NLRB to seek its remedy in state court. Indeed, in Nash-Finch, the Court did not so require. As Justice White observed (dissenting):

Rather than allowing the union to appeal the injunction through the state court system, and to this Court if necessary, as the union would ordinarily have to do, Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, *supra*, the Court today permits the Board to short-circuit that process by securing a federal injunction, solely upon allegations that the conduct of the union was arguably protected under federal law and was within the exclusive jurisdiction of the NLRB. 404 U.S. at 154-155.

We think here that it is neither necessary nor proper for us to require the NLRB to first litigate its preemption claim in the state courts, and we will not decline jurisdiction because of the CIR's claim that plaintiff has an adequate state court remedy.

Accordingly, we do not find that the considerations of federalism and comity or the adequacy of state remedies require that we decline to exercise our jurisdiction, and we will now consider the merits of the plaintiff's claim.

Preemption

Preemption of state regulation occurs where there is a clear manifestation of Congressional intent to occupy the field and supersede the state's exercise of power. New York Department of Social Services v. Dublino, 413 U.S. 405 (1973); Schwartz v. Texas, 344 U.S. 199 (1952). Divining this intent from the provisions of the National Labor Relations Act has involved the courts in a considerable stream of litigation since the passage of the Act.

In the course of this process of interpretation, the Supreme Court has identified a number of different factual patterns wherein federal preemption is indicated. For the purposes of this case, we have found it useful to analyse these cases by dividing them into three categories.

The first consists of cases where the Board has determined that the activity involved is protected by §7 (Rights of Employees), or prohibited by §8 (Unfair Labor Practices), of the Act, or where, even though the Board has not determined the status of the conduct, it may fairly be assumed to be, or is arguably, subject to §§7 or 8. Here the Court has consistently found preemption necessary to avert the danger of state interference with national labor policy as expressed by the provisions of §§7 and 8. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-245 (1959); Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971); Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 (1953); La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949).

The Act has also been interpreted to preempt state regulation in areas where the Board has declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947).

The third category of cases in which the Court has found federal preemption of state regulation is where the activity is neither protected nor prohibited by the Act, and the national labor

policy has been interpreted to require that the activity should be wholly unregulated and left to the free play of economic forces. Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252 (1964); Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, ___ U.S. ___, 96 S.Ct. 2548 (1976). See, NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). A variation within this third line of cases, presenting a limited aspect of preemption, are a number of cases in which the Court found the national labor policy to dictate that the labor relations of particular entities not be subject to the provisions of the NLRA, or any comparable state labor statutes, but not to preclude application of all state laws. Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, 382 U.S. 181 (1965); cf. Beasley v. Food Fair of North Carolina, 416 U.S. 653 (1974).

I

We first turn to the legislative history of the 1974 healthcare amendments (P.L. 93-360, 88 Stat. 395) to see if it indicates that Congress contemplated the preemption of state regulation of labor relations covered by these amendments. We conclude that such was the intent of Congress. Accord, Methodist Hospital of Brooklyn v. New York State Labor Relations Board, 382 F.Supp. 459 (S.D.N.Y. 1974); State of New York v. Local 144, Hotel, Nursing Home and Allied Health Services Union, 92 LRRM 2357 (S.D.N.Y. 1976); North Shore University Hospital v. Levine, 90 LRRM 2529 (E.D.N.Y. 1975).

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This intention emerges distinctly from the remarks made in both the House and Senate during discussions of the 1974 amendments and from the fact that a proposal that the bill be amended specifically to insure the continuing vitality of state labor laws and prevent their preemption was rejected by both houses. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-906, 16908-911 (May 30, 1974); 22575-576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). The remarks recommending that the NLRB favorably entertain the possibility of ceding jurisdiction back to the states under §10(a)^{4/} of the Act, do not suggest a contrary Congressional understanding as to the preemptive impact of the 1974 amendments. 120 Cong. Rec. 22576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). Indeed, such remarks were premised on the recognition that state regulation would be preempted and thus that §10(a) ceding would be the only way that a state could continue to exercise jurisdiction.

Thus we find that Congress intended, by the 1974 amendments, to preempt from state regulation the labor relations of employees of private, voluntary, non-profit hospital employers such as those against whom the CIR filed representation petitions and unfair labor practice charges with the SLRB. Accordingly, if housestaff

4/ Section 10(a) provides in pertinent part: "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry...even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

were employees of such hospitals, all labor disputes between these entities would be within the exclusive jurisdiction of the NLRB. However, the instant action does not present us with this easy case and thus this general expression of Congressional intent is not dispositive.

Here, the Board has ruled that housestaff are not "employees" as defined in the Act, but "primarily students."^{5/} Cedars-Sinai Medical Center, 223 NLRB No. 57 at 3, 8 (1976). It is properly within the power and duties of the Board, as the agency entrusted with the primary responsibility of administering and interpreting the Act, to make this initial determination as to the "employee" status of housestaff. Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947); Bethlehem Steel, *supra*. Indeed, this determination, and a finding that the employer is engaged in activity affecting interstate commerce, are threshold jurisdictional questions which the Board must always resolve before it may entertain any labor dispute presented to it. As a consequence of its finding in Cedars-Sinai that housestaff are not "employees," the Board was required to dismiss the union's representation petition because "no question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act" (*Id.* at 3, 8).

The role of this Court is not to review this original determination by the Board, and we therefore express no opinion as

^{5/} By so holding the Board rejected the contention that housestaff are "professional employees" as defined in Section 2(12) of the Act.

as to its soundness. The controversy in this case concerns the issue of whether or not defendant CIR may request the SLRB to assert jurisdiction over the representation petition and unfair labor practice charges which the CIR filed against the hospitals. The questions before us, then, is whether, given the Board's ruling that housestaff are not "employees" within the NLRB, the Board's further ruling in Kansas City that the labor relations of housestaff are preempted by the 1974 health care amendments from all state regulation is correct.

Since the Board has found that housestaff are not "employees" within the Act, it follows from the interlocking definition set forth in §2(5),^{6/} that their union is not a "labor organization" under the Act as the Board so held in Cedars-Sinai. Section 7 delineates certain rights and protections which the Act affords to "employees." Section 8 prohibits an employer from engaging in certain kinds of activity with regard to "employees" or a "labor organization" and provides parallel prohibitions against certain activity by a "labor organization." Section 9 regulates the procedures whereby "employees" designate or elect their representative for purposes of collective bargaining. Therefore, by their terms, §§7, 8 and 9 cannot apply to protect or prohibit any actions at all taken by housestaff or, their union, or any actions taken by an

6/ Section 2(5) states that: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

employer with regard to housestaff or their union. Cf. Beasley and Lanna Mining, supra.

Accordingly, we conclude that the general Congressional intent to preempt state regulation of labor relations covered by the 1974 health care amendments cannot encompass the labor relations of housestaff and that the preemption doctrine articulated in Garmon and Lockridge, supra, does not apply.

II

The second theory of preemption discussed earlier was delineated in Bethlehem Steel, supra, where the Board had ruled that foremen were "employees" within the definition of the Act and their employer was engaged in interstate commerce; thus the Board had jurisdiction over the representation petition filed by the foremen's union. However, the Board declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. Under these circumstances, the Supreme Court found that for the state to apply its labor laws, and recognize a bargaining unit of foremen, would conflict with the federal labor policy that such units were inappropriate, and thus the Court held state regulation preempted. Plaintiff and amici urge this court to apply the rationale of Bethlehem Steel here.

The problem we find with doing so in this case is that one of the elements vital to Bethlehem Steel is missing. Bethlehem Steel was premised on the fact that the Board had jurisdiction over the foremen's petition. As the Court stated:

The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. 330 U.S. at 776.

The clear import of this passage is that without the Board's ruling that foremen were "employees" within §2(3) -- a ruling upheld by the Supreme Court in Packard, supra -- the Board could not "rightfully" assert power over the union's petition. This conclusion flows directly from the language of the NLRA which, except for the specific provision in §14(a) concerning "supervisors,"^{7/} nowhere applies to the labor relations of non-employees, whether or not they happen to provide their services for entities that are "employers" under the Act.^{8/} The scope of the Board's power to interpret and administer the Act must necessarily be limited by the boundaries of the Act itself. Therefore, once the Board determined that housestaff are not "employees," it had no power to exercise

7/ Section 2(3) states that the "term 'employee'...shall not include...any individual employed as a supervisor." However, Section 14(a) provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

8/ The Board in its original decision in Kansas City General Hospital, 225 NLRB No. 14 (1976), followed the logical consequence of its Cedars-Sinai ruling even one step further and found that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to [housestaff]."

over them and had no jurisdiction over them which it could decline to assert. Accordingly, we conclude that Bethlehem Steel does not control here.

III

Thus it is the preemption principle enunciated in the third group of cases noted earlier that could most properly apply here, where housestaff and their labor relations activities are, because of the Board's ruling, neither protected nor prohibited by the Act. The crucial question, then, is whether national labor policy requires that housestaff labor relations be free from all regulation, state as well as federal, and left to the unrestrained interplay of economic forces in the marketplace. Teamsters v. Morton, Machinists v. WERC, supra.

We first consider whether there is anything in the legislative history of P.L. 93-360 which indicates that Congress specifically intended that housestaff should not be regulated by either the NLRA or any state labor laws.

The general purpose behind the enactment of the health care amendments to the NLRA was to "insure the continuity of health care to the community and the care and well being of patients" (Senate Report No. 93-766 at 4, 93d Cong. 2d Sess. (1974)). To this end, the previous exemption of non-profit health care institutions was deleted from §2(2), on the ground that "the exemption of non-profit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing" (Id. at 3). It was felt that "[c]overage under the Act should completely eliminate the need for

any such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes" (Id.). These special procedures under the Act include requirements that the union give 10-day notice before striking (new §8(g)), and that the union and employer participate in mediation at the direction of the Federal Mediation and Conciliation Service (amended §8(d)). Thus the general national labor policy expressed by Congress in enacting P.L. 93-360 was that the labor relations of non-profit health care institutions should no longer be left to "the free play of economic forces" (Nash-Finch, 404 U.S. at 144), but should be subject to regulation -- uniform federal regulation, in particular.

The only specific position which Congress took on the question of whether or not housestaff would be included in this plan of national labor regulation, was in response to the suggestion that they might be considered "supervisors," and thus be excluded from the Act. On this issue, Congress indicated that housestaff would not come within the definition of "supervisor" in §2(11). Consequently, a special provision to insure that housestaff would not be excluded from the Act was unnecessary. The Senate Report stated:

[v]arious organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional

judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations. S. Report No. 93-766 at 6.

This resolution of the one possible exclusion problem that arose suggests that Congress, at the time it was considering the health care amendments, did not have any policy that housestaff should not be covered by the Act or any other body of labor law. This interpretation of Congressional intent is further supported by the language used in this passage which indicates that Congress may well have thought that housestaff would be classified as "professional employees," as defined in §2(12) of the Act.

Thus, what evidence there is of Congressional intent as to regulation of housestaff under the NLRA points toward their inclusion in the general national labor policy of regulating labor relations in health care institutions. We certainly have found no clear expression in the legislative history of P.L. 93-360 of a contrary national labor policy that housestaff should be unregulated by both the NLRA and any state labor laws.

We next consider the NLRB's ruling on preemption. It appears that the Board's decision, sua sponte, to reconsider its order in Kansas City and address the preemption question was somewhat precipitate. As Chairman Murphy and Member Penello noted in the revised order:

[t]he preemption issue was never raised or litigated by the parties nor was it considered or even contemplated by us in reaching our decision [originally]. Now that the New York Supreme Court has attempted to broaden the original Decision and Order to encompass the preemption issue, we have decided to join our colleagues in deleting the quoted language [that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to (house-staff)]. in this Revised Decision and Order to avoid even the slightest impression that a majority of this Board believes that state jurisdiction over residents, interns, and fellows has not been preempted by the Federal statute.

In addition, however, Chairman Murphy notes that it was not her intent at the time this case was decided that the Board was preempting the field insofar as Federal labor policy might apply to interns and residents, but she has now been persuaded that this was the effect of the 4 to 1 majority holding herein. 225 NLRB No. 14A at 4, fn. 6.

The rationale for its finding of preemption was expressed by the Board (Member Fanning dissenting) as follows:

It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5.

While this explanation does not amplify the Board's ruling on preemption as much as we might have liked, we think it clear enough that the Board reached its decision on the basis of its conclusion that it is the national labor policy that persons who

are "primarily students" should not be accorded collective bargaining right under the Act and should be unregulated by all labor laws, state and federal.

The Board, in the course of ruling on representation petitions by unions seeking to represent employees at educational institutions, has considered, in a number of cases, the propriety of including students working for the institutions in the petitioned-for bargaining units. Leland Stanford Junior University, 214 NLRB No. 82 (1974); Barnard College, 204 NLRB No. 155 (1973); Cornell University, 202 NLRB No. 41 (1973); Georgetown University, 200 NLRB No. 14 (1972); College of Pharmaceutical Sciences in the City of New York, 197 NLRB No. 142 (1972); Adelphi University, 195 NLRB No. 107 (1972).

In Leland Stanford, the Board ruled, as it did in Cedars-Sinai, that the graduate research assistants whose union sought certification of a collective bargaining unit were not "employees" within the meaning of §2(2), and dismissed the union's petition. However, in all the other cases, the Board did not rule that students per se were not "employees" under the Act, but simply found that the students -- referred to by the Board as "student employees," or "primarily students" or "not primarily employees"^{9/} -- did not have a sufficient community of interest with the other, regular employees so as to make inclusion of the student workers in the petitioned-for units appropriate.

^{9/} In Cedars-Sinai, the Board found that housestaff, "although they possess certain employee characteristics, are primarily students." 223 NLRB No. 57 at 3.

the majority of these cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petitioned-for, and not that they should or could never be part of any collective bargaining unit. Indeed the Board in Cedars-Sinai appeared to have explicitly recognized and accepted this principle, stating:

[w]e are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students...we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. 223 NLRB No. 57 at 9.

Accordingly, we do not discern in these cases the expression of a uniform national labor policy that workers who are also students or "primarily students" should be denied collective bargaining rights.

We also have not been directed to, nor have we found, any expression of a national labor policy that students be wholly unregulated in either the Act itself or its legislative history. Nor have plaintiff or amici been able to articulate the rationale which would support such a national policy vis-à-vis students. The impact which collective bargaining might have on the "student-teacher relationship" and the educational experience, which amicus Association of American Medical Colleges urges in support of the Board's ruling on preemption (AAMC Brief at 9-12), may be a legitimate concern of education policymakers, but this is surely beyond the scope of any national labor policy. Further, the student-teacher relationship is not analogous to the supervisor-

employer relationship, and thus we do not find the policies which led to the statutory exclusion of "supervisors" from the Act -- that their inclusion would improperly taint the collective bargaining process both for other employees and the employer, and would upset the balance of power -- applicable here. For a fuller discussion of these policies see Beasley, 416 U.S. at 659-662; NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Packard, 300 U.S. at 496-500 (Douglas, J. dissenting).

Thus, although we are mindful of the deference we owe to the Board's formulations as the agency entrusted with the primary function of interpreting and administering the NLRA, we cannot agree that there is a uniform national labor policy that persons who are "primarily students" should not only be denied collective bargaining rights under the Act, but be left unregulated by any labor law, state as well as federal.

Accordingly, because we have not been able to find any national labor policy that requires that the labor relations of housestaff be totally unregulated and left to the free play of economic forces, we find that the preemption doctrine enunciated in Teamsters v. Morton, Machinists v. WERC or Hanna Mining, all supra, does not apply in the instant case.

IV

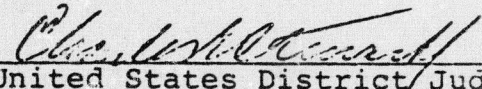
Finally, we recognize that the provisions of the New York SLRA pertaining to hospital workers are not identical to the provisions of the NLRA health care amendments. Sections 713 and 716 of the Labor Law (McKinney's 1965) prohibit strikes and lockouts

and require binding arbitration of any grievance or dispute in non-profitmaking hospitals. These requirements are more restrictive than the strike and arbitration provisions set forth in the NLRA §8(d) and (g) (see discussion supra at 26). However, Congress has expressed particular concern over the disruptive effect on patient care of strikes in health care institutions, and has evidenced a basic intent that the labor relations of these institutions be regulated in order to prevent such disruption. The occurrence, last fall, of recognition strikes by the CIR in response to the hospitals' refusals to bargain with the CIR because of the Board's ruling in Cedars-Sinai and the hospitals' contention that state regulation had been preempted (Gluckmann Affidavit of November 30, 1976 at 2-6), is exactly the evil sought to be removed by the enactment of the 1974 amendments. Thus we think that allowing the possibility of state regulation of housestaff is more in harmony with, and in furtherance of, the national labor policy and Congressional intent relating to health care institutions, than is foreclosing any state regulation of housestaff labor relations.

To summarize, our jurisdiction has been properly invoked under 28 U.S.C. §1337 and we may exercise this jurisdiction under the Nash-Finch exception to the prohibition of 18 U.S.C. §2283. Because of the NLRB's ruling that housestaff are not "employees" under the NLRA, the labor relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board. We conclude that the NLRA does not

preempt the exercise of state power over the labor relations of housestaff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces. Accordingly, we deny plaintiff's motion for a preliminary injunction and we grant defendant CIR's motion for summary judgment. This memorandum decision shall constitute the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

SO ORDERED.


United States District Judge

DATED: New York, N.Y.

January 31, 1977.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	
NATIONAL LABOR RELATIONS BOARD,	:
	:
Plaintiff,	:
	:
-against-	:
	:
COMMITTEE OF INTERNS AND RESIDENTS	:
and THE NEW YORK STATE LABOR RELATIONS:	:
BOARD,	:
	:
Defendants.	:
	:
-----x	

76 Civ. 5119

ORDER

This action came on for hearing before this Court on December 16, 1976, and, after due deliberation, a memorandum decision and order of this Court having been rendered on January 31, 1977 and filed February 2, 1977,

IT IS ORDERED AND ADJUDGED

that the motion of plaintiff National Labor Relations Board for a preliminary injunction be denied, and that the motion of defendant Committee of Interns and Residents for summary judgment dismissing the complaint as to all defendants on the ground that it fails to state a cause of action be granted for the reasons stated in this Court's memorandum decision of January 31, 1977.

/s/ Charles E. Stewart, Jr.
United States District Judge

DATED: New York, N.Y.

March 7, 1977.

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 ----- x
5 NATIONAL LABOR RELATIONS BOARD, :

6 Plaintiff, :

7 v. :

75 Civ. 5119

8 COMMITTEE OF INTERNS AND RESIDENTS :
9 AND THE NEW YORK STATE LABOR :
RELATIONS BOARD, :

10 Defendants. :

11 ----- x
12 Before:

13 HON. CHARLES E. STEWART,

14 District Judge

15 New York, December 16, 1976
16 Room 301 - 3:30 p.m.

17 APPEARANCES

18
19 EDWIN W. BENNETT, Esq.,
20 Regional Attorney, NLRB and
CARL TAYLOR, Esq.,
21 Associate General Counsel NLRB,
Attorneys for the Plaintiff

22
23 MURRAY A. GORDON, Esq.,
MARK KREITMAN, Esq.,
24 Attorneys for Defendant Committee of
Interns and Residents

rdbr

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APPEARANCES
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ERIC ROSENFELD, Esq.,
Attorney for Beth Israel Medical Center

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2 (In open court.)

3 THECOURT: Why don't we start with the NLRB
4 people.

5 Mr. Taylor is it, or Mr. Bennett?

6 MR. BENNETT: I am Edwin Bennett, Regional
7 Attorney.

8 I should like to introduce Mr. Carl Taylor,
9 the Associate General Counsel. It gives me great
10 pleasure to move his admission pro hac vice.

11 THE COURT: Good to have you here, Mr. Taylor.

12 MR. TAYLOR: May I proceed, your Honor?

13 THE COURT: Yes.

14 MR. TAYLOR: May it please the Court, I would
15 like to touch on the jurisdictional point and then turn
16 to a question of preemption. We submit that Nash-Finch
17 clearly confers jurisdiction here, the case of National Labor
18 Relations Board v. Nash-Finch.

19 It makes no difference the board has not
20 issued a complaint here, that the CIR is a proper party
21 and the NLRB is in federal court. And unless the
22 Court wishes me to do so, I do not propose to dwell on
23 that.

24 THE COURT: You say it doesn't make any
25 difference that the CIR is not the subject of a complaint,

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2 is that what you said?

3 MR. TAYLOR: Yes.

4 THE COURT: Why is that?

5 MR. TAYLOR: In Nash-Finch itself there
6 was no unfair labor practice complaint issued. The Court
7 pointed out that the action there was based upon the general
8 doctrine of pre-emption. The board has the authority to --

9 THE COURT: You are relying on the fact
10 that the board has said in Cedars-Sinai and Kansas City
11 matters that the board has pre-empted?

12 MR. TAYLOR: Relying basically on the fact
13 Congress has given the NLRB exclusive jurisdiction
14 over the labor relations in non-profit health care
15 institutions.

16 The board previously had it in health care
17 institutions for profit. It also now has it in non-profit
18 health care institutions. The only health care
19 institutions in which it does not have it are state, local,
20 publicly owned health care institutions.

21 There the board has no jurisdiction over any
22 state or local employees. Public employees are not with-
23 in the jurisdiction of the board.

24 I would propose to briefly track for the
25 Court the legislative history of the 1974 amendments in order

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2 to bring to the Court's attention the legislative history
3 which we feel clearly demonstrates Congress did give the
4 board exclusive jurisdiction to regulate labor relations
5 in health care institutions.

6 THE COURT: All right.

7 MR. TAYLOR: At page 7 of our brief, we have
8 cited a number of references to the Congressional record,
9 the CIR has also cited some of the same references
10 in the papers. The net effect of all of these was an
11 acknowledged concern on the part of a number of members
12 of Congress, both in the House and the Senate, to the
13 effect that the amendments proposed would pre-empt the
14 work of state boards and would take state jurisdiction
15 away insofar as the health care field was concerned.

16 Senator Humphrey spoke to that point on
17 May 7, 1974, in 120 Congressional Records; 7311, which is
18 cited in our brief.

19 If I may, I will just read it briefly.
20 He said, "My only regret is that this legislation will pre-
21 empt Minnesota's state laws dealing with labor relations
22 in non-profit hospitals."

23 He then goes on to say that the State of
24 Minnesota has done a very good job in regulating labor
25 relations in non-profit hospitals and he had hoped that

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that would be able to continue. He said then, "Despite this objection I do support this legislation, for in most states in our nation workers in non-profit hospitals do not have the bargaining power which comes from the right to strike. I believe it is essential we pass this bill today and extend coverage to non-profit institutions."

A little later on in the legislative history, as we pointed out in our brief, an amendment was introduced by Representative Quay, which would have exempted, would have allowed to continue state regulation, where the states were presently regulating.

That amendment was defeated. Finally, at the very end of the legislative process, and I am really skipping over extensive points in the legislative history, your Honor, which are rather fully covered by the quotation, if that be necessary, in the CIR's brief.

At the end of the legislative process Senator Williams, who was the Chairman of the Conference Committee and the manager of the bill in the Senate, in reporting on the conference report to the Senate, said this, and this is 120 Congressional Records Senate 12104 on July 10, 1974, "Sixth, since the question of cession of jurisdiction under the proviso to Section 10A of

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2 the National Labor Realtions Act is one which is enormously
3 difficult, particularly where attempts to deprive the
4 NLRB of such jurisdiction have been turned back by both
5 the House and Senate bills.

6 "Here again, the National Labor Relations Board
7 should carefully consider the effects of any such cession
8 or jurisdiction."

9 This is getting back to the point that a number
10 of Congressmen and Senators had urged the board, after
11 the legislation was passed, to do voluntarily what they
12 had not succeeded in requiring by way of an amendment,
13 namely, to turn back some of the jurisdiction to the
14 states.

15 "Here again the National Labor Relations
16 Board should carefully consider the effects of any such
17 cession of jurisdiction. As the debate showed there is no
18 history of the board ever having done so. While there was
19 considerable favorable comment particularly by the
20 Senators from Minnesota about the operation of the states
21 act requires legislative bargaining as applies to hos-
22 pitals, nevertheless the general purpose of the National
23 Labor Relations Act, as interpreted by the boards and the
24 courts, is to attempt to establish a uniform pattern of
25 collective bargaining rules nationwide without local

variation."

Now, we submit that it is clear that there can be no doubt that Congress intended to give the National Labor Relations Board, as we have said, exclusive jurisdiction over the labor relations of non-profit hospitals. That being so, the board is empowered and entitled to formulate substantive rules, in the words of the Nash-Finch case, for uniform application to the labor relations of non-profit health care institutions.

The board has formulated such a substantive rule in this case. It has decided that house staff are students and not employees, based on facts that it considered, and it has accordingly decided that it would not serve national labor policy to extend collective bargaining rights to individuals who are students and not employees.

The act requires the extension of collective bargaining rights just to employees. The board has held, because of the fact they are students and not employees that it would be counterproductive to extend them those rights as students.

That is the essential basis of the board's decision that it would not be productive to extend those collective bargaining rights. It is not that they are employees, but nevertheless the board is exercising its

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2 discretion not to extend rights to his employees. It is that
3 they are not employees at all and, therefore, it would not
4 be proper to extend them those rights. But the board
5 has in no way relinquished its jurisdiction to determine
6 that question, and to determine it as a matter of uniform
7 application.

8 We submit that once it is established that
9 the board has exclusive jurisdiction, it follows that the
10 board is entitled to that uniform application within the
11 area of its jurisdiction. That's what Congress contem-
12 plated and that's what Nash-Finch contemplates.

13 We also submit that the wisdom of that
14 decision is not before this court; that the final para-
15 graph in the decision of Motor Coach Employees v. Lockridge,
16 which we quoted in our reply memorandum, makes clear that
17 the substantive questions, the underlying substantive questions
18 are not at issue in a pre-emption case: that the wisdom
19 of what the board has done is not at issue.

20 THE COURT: How does that get reviewed in
21 court, if at all?

22 MR. TAYLOR: In this particular circumstance,
23 your Honor, it gets reviewed in what is colloquially
24 referred to as a Leedom v. Kyne suite. That refers to
25 a Supreme Court case by that name, L-e-e-d-o-m v. K-y-n-e,

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2 the citation being 385 US 184, 1958. The decisions
3 of the board are not directly reviewable, when the board is
4 determining representation questions under Section 9 of the
5 Act. The only basis for reviewing a decision of that sort,
6 which this is, is to allege that the board has exceeded its
7 statutory jurisdiction; that it has, in effect, abused
8 its authority under the statute.

9 THE COURT: Well, in the Kansas City -- what
10 is the full name of that case?

11 MR. TAYLOR: Kansas City General Hospital.

12 THE COURT: There was a termination there
13 about pre-emption, as I understand it. Now, can that
14 determination be reviewed in a federal court?

15 MR. TAYLOR: Yes, sir.

16 THE COURT: How?

17 MR. TAYLOR: That determination is before this
18 court. The board has announced that it intended to pre-
19 empt. In other words, that it intended to maintain
20 a uniform rule of universal application and not to allow room
21 for -- in effect to cede jurisdiction back to the states.

22 THE COURT: What is the issue before me as
23 to that?

24 MR. TAYLOR: The issue is whether that is
25 an appropriate ruling to be applied to enjoin the state court

proceedings.

THE COURT: Can I consider whether or not the ruling should have been made?

MR. TAYLOR: I think that the Court can consider whether the ruling is supported, supported by the fact that the board does indeed have exclusive jurisdiction, supported by the fact that the board has indeed made a rule of uniform application to the Labor Relations of health care institutions, and then consider under Nash-Finch whether that is the type of rule that Nash-Finch is talking about when Nash-Finch says that the National Labor Relations Board is the sole protector of the national interest in the area of labor relations and, therefore, entitled to sue directly in court, notwithstanding Section 2283, to enjoin state actions which are inconsistent with its obligation or with its function.

THE COURT: Well, I'm not sure I understand. Would it be or is it appropriate for me, for example, to conclude that there is no national labor policy which requires the board to find that students are not employees?

MR. TAYLOR: Your Honor, we suggest that that is not before the Court; that that is the wisdom --

THE COURT: I am not asking you which way I ought to come out on that question.

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2 MR. TAYLOR: I understand.

3 THE COURT: Is the question one which I need
4 to decide or may decide?

5 MR. TAYLOR: WE would refer the Court to
6 the language that we quoted from the Lockridge decision on
7 page 4 of our reply memorandum.

8 THE COURT: I have it in front of me.

9 MR. TAYLOR: In which the Supreme Court
10 said, "First, our decision must not be taken as expressing
11 any views on the substantive claims of the two parties to this
12 controversy. Indeed our judgment is quite simply it's not
13 the task of federal or state courts to make such de-
14 terminations."

15 That is in the context of a pre-emption
16 case. The Court was considering a very complicated
17 pre-emption question there and ruled on the pre-emption
18 question, making it clear that its ruling on the
19 pre-emption question had nothing to do whatsoever with
20 the substantive claims.

21 We would submit to the Court that that is
22 the controlling rule of law.

23 THE COURT: Then you are saying that I have to
24 assume -- I have to take it as a matter of law that the
25 ruling in the Kansas City General Hospital case, that

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2 residents and interns are not employees and therefore are
3 not subject to the NLRA which is something I can't quarrel
4 with; that I must accept that as the first proposition
5 before I go on to consider other issues, is that right?

6 MR. TAYLOR: With all deference, your
7 Honor, the basic question involved there is whether or
8 not they are students or employees.

9 THE COURT: I am trying to find out what
10 I have to decide, Mr. Taylor, and the more things I don't
11 have to decide the better I like it.

12 MR. TAYLOR: It is our position, your Honor,
13 that it is not before this court and need not be decided
14 by this court and indeed it would be inappropriate for this
15 court to decide that.

16 The wisdom, the merits of that are not a
17 matter within the jurisdiction of the court.

18 THE COURT: What is there left for me on the
19 question of whether or not the board has pre-empted?

20 MR. TAYLOR: As I said, basically whether the
21 board does indeed have exclusive jurisdiction. The guts
22 of the pre-emption question is whether Congress has
23 designated the National Labor Relations Board as the exclus-
24 ive decider of the labor relations issues in these areas.
25 Congress has basically set up a statutory framework which
makes labor relations policy a federal one and has

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2 exercised its rights under the commerce clause to, gener-
3 ally speaking, pre-empt state authority in labor relations
4 in the interest of having a national uniform labor relations
5 policy.

6 It has established the board as the body
7 of expertise to make those basic judgments with respect to
8 labor relations policy. Those judgments being review-
9 able on the merits within and to the extent provided
10 by the National Labor Relations Act.

11 THE COURT: Well, is this one way of putting
12 the question before me: Is the action which the
13 board took in the Kansas City Hospital case consistent
14 with the instructions it received from Congress?

15 MR. TAYLOR: I would suggest to the Court that
16 that is the Leedom v. Kyne suit.

17 If the CIR -- the CIR has the freedom and has
18 the right to file a lawsuit in which it is the complaint
19 and the alleging that the board has exceeded or abused its
20 statutory jurisdiction, that it has violated the will
21 of Congress.

22 There are some fairly stringent tests that must
23 be met. It must clearly appear, as Leedom v. Kyne says,
24 it must clearly appear that the board has violated a
25 prohibitory injunction in the statute. Leedom v. Kyne suit

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2 will not even lie for the failure to perform an affirma-
3 tive duty. It must appear that the board has done
4 something that it was ordered not to do.

5 Now, if Leedom v. Kyne, the board had
6 included professionals in a unit of non-professionals
7 and the statute says, in so many words, that professionals
8 shall not be included in a unit of non-professionals for
9 collective bargaining purposes.

10 The union involved there sued in the
11 District Court and the Supreme Court ultimately held the
12 District Court's jurisdiction to enjoin actions by the
13 National Labor Relations Board which are clearly in violation
14 of the statutory command.

15 But, as I say, that is a different lawsuit
16 and it is a lawsuit directed toward enjoining the board.
17 There is no such lawsuit pending before this court,
18 although it could have been filed. There is an attempt
19 or at least a suggestion of attempt to get that lawsuit
20 into this case by the back door. It is not appropriately
21 there by the back door.

22 If the CIR feels that the board has exceeded
23 its statutory jurisdiction, in the Leedom v. Kyne sense,
24 its remedy is to file that lawsuit and get that issue
25 adjudicated under the law that applies in Leedom v. Kyne.

THE COURT: All right.

MR. TAYLOR: Thank you, your Honor.

THE COURT: Have you finished already?

MR. TAYLOR: Yes.

THE COURT: Well, I have some more questions.

MR. TAYLOR: I might say, we basically view this, as I have indicated, as a fairly simple case in terms of the pre-emption argument.

THE COURT: The CIR things that even though I can grant you the injunctive relief that you asked for, that I shouldn't, that I should let the state courts do what they are going to do before I act. I should abstain, in other words, at least for the time being. Why isn't that a good solution?

MR. TAYLOR: Nash-Finch indicates, we suggest that Nash-Finch indicates, that the stage of proceedings in a state court is irrelevant. That is another part of the argument that the NLRB somehow should have gone into the state court or perhaps taken apart in the state proceedings. In the Nash-Finch case itself the board filed that lawsuit when the state trial court injunction had issued. It was at that stage. At that stage we have an outstanding state order which is in conflict, and at that stage the National Labor Relations Board

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2 filed the lawsuit and the Supreme Court held that that was
3 appropriate.

4 THE COURT: I am assuming it is appropriate,
5 but if I accent your view, that I may enter an injunction,
6 have the power to do so, I am wondering whether we
7 shouldn't wait and see what the state court does. What harm
8 is there to the board if we wait and see what happens
9 in the state court?

10 MR. TAYLOR: There is harm, first of all,
11 that this whole are continues to be clouded.

12 THE COURT: I suppose because we are talking
13 about an injunction we need to find irreparable harm.

14 MR. TAYLOR: The irreparable harm,
15 your Honor, we would suggest is the harm to the national
16 interest by a private party and a state board attempting
17 to reach a result which is contradictory to the National
18 Labor Relations Board, where the National Labor Relations
19 Board has exclusive jurisdiction.

20 THE COURT: Suppose it is contradictory,
21 who is going to be hurt by it?

22 MR. TAYLOR: I don't think the Supreme Court
23 has envisioned in dealing with the entire pre-emption
24 question, either in Nash-Finch or nay other pre-emption
25 case, that pre-emption comes down to a judgment of how

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2 great the interference is.

3 The question is, is there interference or is
4 there not interference? And the Supreme Court has never
5 said that we should look and balance the degrees of harm
6 before determining that the area is simply pre-empted.

7 THE COURT: At the moment nobody has been
8 hurt. You talk about interference. There isn't any
9 interference at the moment. Perhaps there wouldn't be
10 any. The state board might decide to give the residents
11 and interns collective bargaining rights. Would this in
12 some way interfere with the national labor policy? The
13 national labor policy I guess is that interns shouldn't
14 be protected under the National Labor Relations Act, and
15 I suppose also at least arguably, under the State
16 Labor Relations Act. What is it in the national policy
17 which is going to be offended by the state board here
18 permitting interns and residents to have collective
19 bargaining rights?

20 MR. TAYLOR: The national policy, is, your
21 Honor, that interns and residents should not have col-
22 lective bargaining rights. It is not that they are some-
23 how removed from the National Labor Relations Act.
24 The board has made it very clear it has no intention --

25 THE COURT: They shouldn't be allowed to bar-

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19

2 gain collectively. I am curious as to why that is so.
3 Since the board has reached one decision, that they aren't
4 going to regulate these people and that they are
5 regulating them -- I suppose to be more accurate, to the
6 extent that they aren't going to regulate them they
7 shouldn't have collective bargaining rights. I understand
8 they have done that, but why is it contrary to the
9 national interests just because the national board has said
10 that when the state board has said something to the
11 contrary?

12 Perhaps we are overdoing this.

13 MR. TAYLOR: Perhaps it is a question of
14 terminology, but I would suggest to the Court that the
15 board is indeed regulating them. It is not that the board
16 has said we will not regulate them.

17 THE COURT: I accept your terminology.

18 MR. TAYLOR: The board has retained juris-
19 diction over the area and over this question. It has not
20 in any sense ceded this question back to the states.

21 On the irreparable injury, in terms of time,
22 in terms of the question of abstention to allow the
23 state processes to work their course, throughout the entire
24 line of pre-emption cases, beginning with Garmon and
25 coming to the present, the whole framework and fabric

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is the suggestion that it is appropriate for these issues to be litigated in the state proceedings; that this area is a matter that is exclusively within the federal domain and that part of the pre-emption doctrine is the concept that we ought not wait and see how it come out in the state courts, and see if it is harmful. There is no suggestion of that in any Supreme Court decision.

The sole question that it focused on is, is it pre-empted or is it not pre-empted? If it is pre-empted and if there is a danger of conflict arising by the fact that somebody has asserted a position which has risen to the level of a justiciable controversy, and that's the reason we waited until an order had been entered.

As a practical matter, to wait and allow this matter to work its way through the state courts is going to continue to throw this area into confusion.

WE already have a rule by the Pennsylvania State Supreme Court --

THE COURT: How did that case get to the Supreme Court?

MR. TAYLOR: It was not brought to the attention of the NLRB. The case got-- we have to attempt to keep track of these cases, and that one did not come to our attention.

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2 THE COURT: I take it at one point the CIR brought
3 this case to your attention when they invited you to
4 join the state proceedings.

5 MR. TAYLOR: That's right.

6 THE COURT: Incidentally, the Kansas City
7 case, and the other one, Cedars-Sinai, are there any
8 appellate proceedings, appellate court proceedings there?

9 MR. TAYLOR: To review those decisions?

10 THE COURT: Yes.

11 MR. TAYLOR: Not directly, no, sir. The
12 board's decisions can be reviewed on appeal directly
13 only if they subsequently lead to an unfair labor practice
14 charge. I would not be candid with the court if I
15 suggested that those -- in the particular posture of those
16 decisions that they could lead to an unfair labor practice
17 charge.

18 THE COURT: Can't you go into the Court of
19 Appeals for an enforcement order? Is that what you
20 are talking about now?

21 MR. TAYLOR: WE can go in for an enforce-
22 ment order if the board has ordered somebody to do some-
23 thing.

24 THE COURT: And they haven't done it.

25 MR. TAYLOR: They haven't. The board has or-

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2 dered nobody to do anything in these cases. So that the
3 board itself -- there is nothing for the board itself
4 to go into the Court of Appeals on, nor is there anything
5 for any other party to go in on because nobody, again,
6 has been ordered to do anything.

7 THE COURT: All right, thank you.

8 MR. TAYLOR: Thank you, your Honor.

9 THE COURT: Mr. Gordon.

10 MR. GORDON: I would like to address at
11 the outset the issue, as I see it, as to which your Honor
12 had made inquiry.

13 I think the issue here is whether the action
14 of the National Board is in fact pre-emptive of the police
15 power of the State of New York to regulate the affairs
16 of hospitals and house staff officers in their dealings
17 with hospitals. That is the issue.

18 Now, I agree, although I must say we were
19 sorely tempted to attempt in this case to get reviewed
20 the Cedars-Sinai decision as to the employees status of
21 house staff. And we considered that at great length and
22 I think very plausible arguments could have been made
23 out to bring that question as an integral part of the
24 issues which were raised by the National Board in this
25 proceeding.

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2 given to the National Board by the Congress in the area
3 say that this court is foreclosed on that question
4 because of what was said in Kansas City is novel and I think
5 untenable and unsustained doctrine, so far as I know it.

6 Particularly in the context of how that was
7 done in Kansas City. The issue of pre-emption was never
8 raised by any party in the Kansas City case. It wasn't
9 argued in the Kansas City case.

10 We have alleged this in our papers, your
11 Honor. It is not denied. On a motion for summary judgment
12 that you have here, the record you have are our affidavits
13 and our pleadings, with no contradiction of anything
14 contained in them. That is the record you have. We
15 have alleged there that in the Kansas City case, the issue
16 of pre-emption wasn't argued to the board.

17 In fact, I don't know of any case before
18 the board where the issue of pre-emption has in
19 fact been fully argued and presented.

20 They just, after having seen Gellano's
21 decision here in the Supreme Court of New York, and we have
22 no knowledge of what they had before them in dealing with
23 the issue of pre-emption, they decided that the Kansas City
24 original decision, where they used inept language that they
25 wanted to change because they were afraid of its implications

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2 and at no one's instance but their own, this was sua
3 sponte, they issued a revised decision and expressed
4 themselves of how they felt on the issue of pre-emption.

5 Now, if that's the kind of process which can
6 foreclose review of a question of that order of magnitude
7 by this court, I'm surprised, and I don't think it can
8 be seriously contended.

9 I also think it is misleading to make things
10 into a simple or simplistic case and say that once the
11 National Board decides that someone is excluded from the
12 coverage of the act, that that means that no state or local
13 government can deal with those who have been excluded from
14 the coverage of the national act and that that's the
15 doctrine of pre-emption. It just isn't the case.

16 I think this can be established very quickly.
17 If you look at the exclusions contained in the act itself,
18 the act itself excludes from its coverage agricultural
19 workers, domestic workers, self-employed workers. That's
20 explicit in the act.

21 No one is suggesting for one moment that
22 because there has been exclusion of those classes of
23 employees from the coverage of the act, that no state or local
24 government can deal with them in labor relations.

25 No one has ever suggested that seriously

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2 here. The board itself doesn't do so. Is the board
3 saying that the California legislation covering agricultural
4 workers and specifically those who were excluded from the
5 coverage of the national act, cannot be covered for labor
6 relations purposes in the State of California?

7 Is the board saying that because public
8 employees are excluded from the coverage of the act,
9 that no local, state, county, city can deal with public
10 employees for labor relations purposes? What a shocking
11 proposition that would be across this whole country.
12 No one has ever suggested that.

13 THE COURT: I take it the board wouldn't dis-
14 agree with you, but as to the people here they say that
15 they aren't excluded from the coverage of the act.

16 They say that they are included except we
17 aren't going to let them get the benefits of the act.

18 MR. GORDON: That is not Cedars-Sinai.
19 That's an after thought that I think they were dealing
20 with once they saw the implications of coverage under
21 the state act. Cedars-Sinai doesn't utter one word to
22 that effect. This is what Cedars Sine decided. They said,
23 yes, they have characteristics of employees but they also
24 have a great many more characteristics of students and,
25 therefore, they are primarily students and not governed

under the act.

I have never seen a previous decision by the board. And member Fanning in his dissent points out how new and novel a doctrine that is. That is not the issue before you, but the board then went on to say that those persons in that character of primary students, not employees within the coverage of the act, and their labor organizations, the organizations to which they belong are not labor organizations within the meaning of the act.

That is jurisdictional, your Honor, because the authority of the board, its jurisdiction is predicated upon its capacity, its stated capacity to act with respect to employees as they are defined under the act. And when they found that these house staff officers were not employees within the meaning of the act, the necessary implication and correlation of that was that they did not have jurisdiction over house staff officers. That's what it means. Because the important sections of the act, 8, 9 and 10, deal with unfair labor practice charges and deal with certification proceedings.

Now, every one of those provisions, operative provisions is key to the right that one has on behalf of or against an employee. That's the heart of the act. They have jurisdiction, not over students, but

only over employees.

So that in point of fact they have no jurisdiction to declare a national labor policy with respect to a class of persons over whom they have no jurisdiction. By their own determination in Cedars-Sinai. But we don't have to engage in analysis of that kind. Find out just why this thing won't fly from their point of view, your Honor. I think we have to look at the effect of what happened here and ask an important question. It is clear that the mere fact of exclusion from coverage of the act doesn't mean pre-emption. Otherwise you can't explain the agricultural worker, the public employee, et cetera. It is also clear there are some instances where the exclusion of coverage means that the states can't deal with respect to such employees. And let us take the typical case, the Bethlehem Steel case dealing with supervisory employees. In Bethlehem Steel, the board at that juncture in its history, had decided that supervisors, although they might be employees and, therefore, are covered under the definition of the term employees, they felt it was contrary to the underlying purpose of the fact to permit collective bargaining to be mandated by supervisory employees because, they said, if supervisors can compel bargaining and can join unions, there will be a conflict of

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2 interest and of loyalty because a supervisor is a surrogate
3 of management and if you had supervisors in unions with
4 rank and file people and sitting on both sides of the
5 table, it would corrupt the entire bargaining process
6 as it affects the rank and file as well as the supervisors.
7 And for that reason they found that exclusion of super-
8 visors by the federal government necessitated a
9 comparable exclusion of coverage of them by the state
10 government, in order to protect, and this is the heart
11 of it, in order to protect the integrity of that part of the
12 act which dealt with those employees clearly covered under
13 the act.

14 Now, that state of affairs, letting this
15 evolve in that fashion where the Supreme Court said okay,
16 you can have a total exclusion of coverage here, was not
17 satisfactory to the Congress. It went on ahead and provided
18 in Section 14A of the act two very interesting things.

19 First, it expressly excluded supervisors
20 from coverage, and then it went on to say expressly
21 that no state or local government could provide coverage
22 with respect to such supervisory employees. Because the
23 Congress knew if there was going to be a no man's land
24 created, that it's the Congress which should do so and so
25 expressly.

2 And when, once again, there was another possible
3 no man's land created when the board decided to decline
4 jurisdiction in an area where it had jurisdiction --
5 this is 14C of the Act -- it goes on to say specifically,
6 pursuant to the 1959 amendments, it went on to say speci-
7 fically that when the board declines jurisdiction, there are
8 limited circumstances and different from what we have
9 here, but the concept is significant here, your Honor.

10 Under 14C, when the board declines juris-
11 diction in any other kind of case, it specifically
12 provides in 14C(2) that the states and local govern-
13 ments shall then have jurisdiction with respect to those
14 as to whom the board has declined jurisdiction.

15 So what is the pattern? The pattern is,
16 your Honor, that where exclusion is suggested it created
17 a no man's land, so as to wipe out any coverage, state as
18 well as federal, the Congress has made it clear that
19 the one who makes that determination is the Congress
20 and it has done so with respect to supervisory employees.
21 That in those area where the board might create a no man's
22 land by declining jurisdiction over a class of employees
23 where the amount of commerce is insubstantial, it specifi-
24 cally plugged the gap. And when you look at the
25 legislative history, and we have set it out at consider-

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2 able length, in the colorful colloquy of Senator Kennedy
3 and Senator Dirksen with respect to that development,
4 it is clear Congress does not want no man's land
5 generally in this area. And yet that is specifically
6 the net effect of the action which the board has taken.

7 if the Congress has a general perception with
8 respect to no man's land in other less sensitive areas of
9 the economy, in this particular area the concern in that
10 regard is most particular. If there is one thing that is
11 true of the legislative history of Public Law 93-360, that
12 is, the health care amendments of 1974, it is that
13 Congress was hoping that it would be able to end juris-
14 dictional strikes in the hospital industry and imposes
15 constraints that would discourage impasse strikes in the
16 hospital industry. They were concerned about strikes
17 that might have dangerous effects upon patients.

18 I don't think that anyone here can suggest
19 for a moment that the Congress, in the remotest way, in-
20 tended that this area of potential strife and
21 strike with respect to house staff officers was to be left
22 open ended and in fact virtually mandated to provide house
23 staff to do this.

24 That is the net position they take. Quite
25 the contrary, your Honor, when you look at the legislative

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2 history, particularly on the power of cession under
3 Section 10A of the act that Mr. Taylor adverted to,
4 that's very interesting. What happened was that the
5 Senators from Minnesota, and some of the Congressmen from
6 Minnesota, and those Senators with Mondale and
7 Humphrey in that session of Congress, and Representative
8 Quay, they said, listen, we have a great act operating
9 here in the hospital act in Minnesota. What's going to
10 happen to it? We don't want to see that wiped out.

11 The answer to that was, almost in the nature
12 of a commitment from the Floor leaders, and in the case of
13 the Senate it was Senator Taft, and on the House side it
14 was Representative Thompson, and Senator Williams in
15 reporting the conference report after the matter had gone
16 through conference, they said the following, and this was
17 in an area where it was presupposed there would be cover-
18 age, not exclusion, they were presupposing they were dealing
19 with an area where the national act would apply, where
20 they had jurisdiction, where there would be coverage.

21 The response which was made to the people
22 from Minnesotawas, that we expect that the National
23 Board will cede jurisdiction under 10A.

24 In the 1972 report on predecessor legislation,
25 the majority of the house labor committee said it explicitly,

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2 that they expect that there would be cession under 10A
3 to the states, where there was state legislation on the
4 subject.

5 Minnesota's legislation is almost identical
6 with New York. So rather than being concerned with a lack
7 of uniformity or diversity of application or anything of
8 the sort, the Congress, when it passed this legislation,
9 had in mind and expected that the laws in those states
10 would be operative under the doctrine of cession.

11 They were mistaken, and it was unfortunate
12 that they didn't adequately recognize and realize that this
13 National Board in 40 years of existence has never ceded
14 jurisdiction, never, and that they would do so with respect
15 to the law of Minnesota since it had differences in
16 strike and arbitration and the like, they should have been
17 able to anticipate, sure enough, the board very
18 promptly, in re Minnesota, held there couldn't be cession
19 to Minnesota because of the differences between
20 the two bodies of law.

21 But that doesn't go to the state of mind
22 of the Congress when it passed this legislation.

23 It is untrue to say that the Congress
24 intended that the state laws on the subject would not be
25 operative. Quite the contrary, they expected

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2 and intended those laws to be operative and to do so
3 through cession under Section 10A. That was their
4 understanding at that time.

5 But it goes further, your Honor, and here
6 fortunately there are hearings to which I can refer, but it
7 is a matter of my only personal experience, the Congress did
8 have one instance where it was squarely presented to it
9 the risk of pre-emption where there had been non-coverage.
10 It was in the case of the house staff, but not in con-
11 nection with their employee status but rather their super-
12 visory status.

13 Let me spell that out very briefly. Training
14 programs, house staff officers and training programs
15 operated in relative hierarchies. The intern supervises,
16 in the interest of patient care, the orderlies, non-profession-
17 als. The first year resident supervises the intern, so
18 on up the line.

19 The CIR, which is of 1974, had been engaged
20 in collective bargaining in the State of New York since
21 1957, was very concerned that while the state law had no
22 exclusion of supervisors, the National Act did, and we were
23 concerned that if the house staff were found to be super-
24 visory employees and, therefore, excluded under the National
25 Act, then we would be locked in under Section 14A of the

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2 National Act which would have precluded the continuance
3 of jurisdiction and coverage under the state act. And
4 we raised that specific question to the Senate at the hear-
5 ings.

6 The consequence of that was that both Houses
7 issued committee reports, and I am very familiar with
8 those committee reports; they issued committee reports in
9 which they reassured the house staff, listen, said the reports,
10 so long as the supervision in which you are engaged is in
11 the interest of patient care rather than as a foreman, as
12 a surrogate of management or the employer, that is not
13 within the supervisory exclusion. So the one time, your
14 Honor, that the Congress had before it the risk of total
15 exclusion and a no man's land, it acted as effectively as
16 it could in the circumstances to foreclose them.

17 Now, I want to address the question of
18 jurisdiction very briefly. I would want to conclude on
19 the issue of pre-emption that some of the commentators,
20 and I remember in one of the even early cases, Judge Douglas
21 said that one had to be a Delphic Oracle to know what is
22 and is not pre-emption. And the questions do seem rather
23 complicated and exotic and it may be presumptuous of me to
24 say that I think that when you get all through studying all
25 aspects of pre-emption, it really comes down to a single

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2 and simple proposition. State action which conflicts,
3 actually or potentially, with federal action where there
4 is federal coverage and the exercise of assumption of federal
5 jurisdiction is pre-empted in the labor field. That what
6 it is all about.

7 Conflict is what it is all about. That's the
8 real meaning of the supremacy clause. Now, how does that
9 work out in the labor field under the authorities? Where
10 the National Board has acted in an area where it has
11 coverage and has acted affirmatively and occupied the
12 area, it is quite clear that if the state undertakes to
13 do the same sort of thing, and certainly if it tries to
14 do something differently, that's preempted. That's not this
15 case.

16 The next extension is, suppose you are in an
17 area where the National Bank has not acted but it is
18 arguably covered; that is to say, that the activity which
19 is involved and which the state is seeking to regulate, can
20 arguably be protected or arguably prohibited under the
21 National Act. Again, even if the National Board has not
22 yet acted, the potential for conflict in those circum-
23 stances is great enough that preemption is operative.
24 That is the Garmon case. But, again, conflicts are at the
25 heart of it.

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2 That is eschewed here by the National
3 Board. That was repeated by Mr. Taylor here today
4 in response to your questions. There is no question
5 that house staff activities do not come within the
6 act in the sense that they don't propose to regulate it.
7 That's what he has told you. That he wants to see to
8 it, that no one regulars it.

9 Now, clearly, it is nothing arguably pro-
10 hibited or protected under the act if, as the board tells
11 you here, that non-employees -- there are not employees
12 in the act and they don't propose to regulate house
13 staff labor affairs. So Garmon doesn't apply.

14 Then there are a series of cases, such as
15 the recent machinist case, where Congress has made it
16 clear that it intends a certain area to be left open,
17 unregulated, to be left to the forces of economic pressure
18 and conflict of both sides. That is clearly no Congressional
19 intention here.

20 No one, in all of the voluminous briefs that
21 you have had or that I have seen in the state court or before
22 the State Labor Relations Board, has pointed to a single
23 instance where the Congress said that in the area of house
24 staff affairs we intend to leave strike, strife, labor
25 dispute problems, that we intend to leave to the free play

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2 of the economic forces of the hospital and the house staff.
3 The whole thrust of the legislative history is to the
4 contrary. So that is not the case.

5 It certainly is not the case where there
6 has been exclusion from coverage and that exclusion is in or-
7 der to protect the integrity of the rights of the
8 National Labor Relations Act with respect to those persons
9 covered by the act. That's Bethlehem. To say we exclude
10 supervisors in order to be sure that there is a
11 free and clean collective bargaining process for all of the
12 others covered under the act, exclusion in those circum-
13 stances is pre-empted again because of the actuality or
14 potentiality of conflict. That is not the case here
15 either. There is no one who is saying that to permit
16 bargaining with house staff officers will somehow or
17 other pollute the bargaining process with respect to other
18 employees.

19 If anything, the argument cuts the other way,
20 your Honor. To think of having in a single institution
21 everybody else subject to the prohibition of original or
22 jurisdictional strikes and required to undergo very
23 careful processes of fact finding and mediation with
24 respect to strike notices with respect to anybody else
25 in the hospital but the hospital staff alone should not

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2 be subjected to that. I can't think for a moment that
3 the clarity, the integrity of the bargaining process for
4 other employees in hospitals are somehow or other en-
5 hanced by keeping house staff officers from engaging in
6 collective bargaining.

7 I can't believe, I can't believe that the NLRB
8 says the national labor policy is that which was suggested
9 by the AAMC in its brief. The AAMC told us where they
10 are at, and I suppose where the amici here are. They say,
11 listen, the educational process presupposes an inequality
12 between those who teach and those who are taught. That
13 is inherent in an educational process. Therefore,
14 we require inequality in the relationship between a
15 hospital administrator and the house staff as to wages,
16 as to hours, as to other terms and conditions of the work
17 which they perform. That's the national labor policy
18 that the AAMC sees furthered by the position of the NLRB.

19 The NLRB hasn't said that and I doubt it
20 will say that. To think that the national labor policy
21 is to permit unimpaired and without capacity for mediation,
22 the exploitation of young house staff officers is unthink-
23 able, and that cannot be the National Labor policy and you
24 cannot find authority for such a policy in anything the
25 Congress said, thought or uttered.

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2 All that is left is a kind of shibboleth
3 reliance upon the proposition that it must be the same
4 everywhere because that is how it is under the National
5 Act.

6 I may say that when you are all finished
7 analyzing the position of the National Board, that is what
8 it is. They send we find they are not employees for the
9 purposes of the act and it has to be uniform everywhere, and
10 that's it. That's the whole case.

11 Well, why isn't that equally true for those
12 persons expressly excluded from the act by the Congress?
13 It is not true for agricultural workers or others,
14 as I have pointed out. The reason why that's enormously
15 significant here, your Honor, is because the motion of
16 uniformity in the exclusion of house staff officers from
17 collective bargaining can't be realized, even if your Honor
18 should grant them the doctrine of pre-emption here.
19 Almost 50 percent of those persons in training programs
20 as house staff officers are at public institutions, federal,
21 city, county, state, et cetera, hospitals. They are
22 excluded from the act and they are in collective bargain-
23 ing. That's the reality.

24 In New York, under the laws of the State of
25 New York as interpreted by PERB, house staff who are engaged

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2 in state institutions are entitled to engage in collective
3 bargaining. In the City of New York, under the
4 New York City Collective Bargaining Law, house staff
5 officers in the city institutions in the Health and
6 Hospital Corporation, in mayoralty agencies, are entitled
7 to and are engaged in collective bargaining today. That's
8 the situation in New York.

9 I will tell you how ludicrous it becomes
10 to talk about exclusion in New York City, and this is set
11 out in our papers, your Honor. Many house staff officers
12 rotate among different institutions. There are many who are
13 working in the municipal hospitals, who rotate through
14 the voluntary hospitals and are maintained on the
15 Health and Hospital Corporation payroll. They are
16 covered under a city contract, even when they are at the
17 voluntary hospitals where the National Board says there
18 should be exclusion.

19 And this is a process that takes place all
20 over the country. It is one of the characteristics of
21 the training programs. There cannot be uniformity,
22 there isn't uniformity and uniformity is not the be-all
23 and end-all. Uniformity under the cases, as I
24 read it, as I read the cases in the pre-emption, is part
25 of the whole notion of conflict. That is to say, when

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2 the national government has occupied an area, exercised
3 its jurisdiction, taken action, ceased themselves of
4 the employees involved, then obviously the localities
5 may not do the same.

6 Now I come to still another very difficult
7 implication which derives from the position of the board.
8 Suppose they are right. Suppose the National Act, as
9 authoritatively construed by the National Board, mandates,
10 1, there be no regulation of house staff by the national
11 government; and, two, precludes any state from exercising
12 regulation of house staff in labor relations matters.

13 I think there are serious Tenth Amendment
14 questions which follow from that. Can they really say that
15 the people of the State of New York can be prevented, wholly
16 and completely, from regulating labor relations with
17 respect to house staff, where the failure to regulate that
18 creates the potential for instability, for quarrel, for strife
19 and for strike?

20 I want to talk about strike, which is
21 not a happy prospect for anyone. Under the state law in
22 New York we have a little Norris-LaGuardia Act. You cannot
23 join a strike which is part of a labor dispute. We have
24 an exception to that in Article 20 of the labor law which
25 sets up the State Labor Relations Act in the instance,

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2 your Honor, of hospital employees and only in the instance
3 of hospital employees. The same Article 20 which permits
4 an exception to our little Norris-LaGuardia Act in the
5 State of New York, sets up, as a trade off, counterpart, as
6 a necessary corollary, the labor relations system governing
7 the hospital industry and particularly voluntary hos-
8 pitals, with special rights to arbitrate grievances,
9 special right to arbitrate impasse in bargaining.

10 The State of New York, and Judge
11 Fold put it very aptly in the Catherwood case, had found that
12 you can't deal with strikes and problems in the hospital
13 industry just by injunctions, by prohibiting them by
14 instructions or criminal prosecutions. They had woeful
15 experience with that in New York. New York found
16 the only way to deal viably with that problem was to give
17 the right to collective bargaining, representation and
18 where there was an impasse, an arbitration procedure in lieu
19 of a strike. That they felt was the answer to it, and
20 it does work in New York.

21 Now, your Honor, where will the power be to
22 enjoin a strike in New York if it derives only from that
23 same section, that same part of the labor law which sets
24 up the right to bargain collectively and all of the
25 other rights which I have indicated. Can you select

2 those portions of the labor law that are harmful and not
3 give the trade offs that the experience in New York
4 seem to require as corollaries? I think not, your Honor.
5 I think what it means as a practical matter is that they
6 really would cast house staff and all of these problems
7 into a no man's land so that the people of the
8 State of New York would be without power, totally without
9 power, to protect the lives and the welfare of their citi-
10 zens.

11 Now, I know that the Tenth Amendment was a
12 dead letter after United States v. Darby years back, and
13 that was the conventional learning when I was at law school
14 and thereafter. It was a kind of glorious rhetoric
15 that didn't mean anything. That's no longer true after the
16 Usuary case. In that case, in the last term of the court,
17 it was squarely held that the extension of the Fair Labor
18 Standards Act, minimum wages and maximum hours to local em-
19 ployees was a violation of the Tenth Amendment. Because
20 it impinged upon essential reserve powers of the people of
21 the states in the states.

22 So much more the case here, your Honor, because
23 I must point out to your Honor, I think the absence of
24 recourse to the National or State Board is the exact
25 explanation of why there was a strike for ten days here in

New York during the month of October of this year.

If we had been able to go to the National Board or to the State Board it would have never occurred, it would not have been necessary, there would have been a way to deal with it. Because, your Honor, the CIC didn't strike because it wanted more money. What had happened was that every hospital in the city which had been bargaining with the CIR for almost twenty years successfully, and as Mr. Abelow, general counsel for the League of Voluntary Hospitals, testified before a Congressional Committee, harmoniously. They found that every hospital in the city, with contract mainly terminating on October 1, 1976, said, under Cedars-Sina we don't have to bargain with you and we are not bargaining with you. They terminated contracts, they wiped out contract rights that had been developed over years, they lowered salaries, they impaired upon the due process right that those men and women had, essential to the protection of their careers, because they could be fired at a moment's notice, and it means the end of a career in a training program.

All those wiped out and the house staff and CIR, and that's the only organization representing house staff in this area, your Honor, was to self-destruct at that point.

No one would negotiate or recognize, contracts were being wiped out, which is all in the record here, uncontradicted. The state board would not assume jurisdiction and in the courts the hospitals were eminently successful in delaying a disposition until after the contracts had terminated.

Now, if that is an appropriate type of the effect of the position of the National Board, house staff given no recourse, put at the complete arbitrary control of persons who tell you that they perceive the relationship to be an inequalitarian relationship, tell you that they are to be treated as students in an elementary school and the like where they must get ordered around by teachers and directed by them.

Mature men and women, average age in excess of 27, graduated from college and medical school, licensed to practice their profession, responsible for life and death situations for patients, students to be ordered around at the arbitrary whim and unaccountable power of the administration of the hospitals. That's what they are expected to abide. I cannot tell you that cannot be done with young people today. There is no way that they are to be told that you are mere students and you have no word on the question of your hours, your wages, your training

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2 program or when you can be dismissed or the like.

3 Look at the contracts that we have
4 there, your Honor. They are attached as Exhibits 1 and 2
5 to our answer, and you will see the range of rights and
6 the balances of interests that were worked up carefully and
7 delicately over the years, wiped out, your Honor.

8 What recourse do they have in such circum-
9 stances if the National Board is correct. Reading of
10 the act, but to take the kind of, really, last step
11 measures that were taken in October of this year? There
12 are no recourses left to them except that under the board's
13 doctrine. Is that the policy, the National Labor
14 policy involved here? Is that what Congress intended
15 when it passed Public Law 90-360? This is what the
16 general counsel of the National Board said shortly after
17 the adoption of the legislation, that it was adopted to ex-
18 pand the rights of collective bargaining. Mr. Taylor had
19 to read that when he was reading part of the Congressional
20 debates and I noticed his voice faltered on it,
21 your Honor, can you imagine legislation intended to ex-
22 tend the right of collective bargaining here being
23 construed by the National Board to strip away bargaining that
24 already existed? Because before 1974 these house staff
25 officers, this very house staff officers had been held

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2 by the State Labor Relations Board to be covered under
3 the State Labor Relations Act. We had certificates from
4 them. I may also tell you that we had a half dozen
5 certificates from the National Board Regional Offices
6 before the decision in Cedars-Sinai in March of 1976.

7 So that the reading of this act --

8 THE COURT: It seems to me you are saying
9 or suggesting that Congress made a mistake.

10 If Congress made a mistake they should
11 correct it, not me.

12 MR. GORDON: The Board made a mistake.
13 Congress never intended it would be a stripping and diminution
14 of rights.

15 THE COURT: Congress didn't intend the
16 results from the words they enacted.

17 MR. GORDON: No words in what they en-
18 acted, your Honor, no words of what they enacted which
19 suggested to the slightest degree that there was going to
20 be a pre-emptive effect accorded to non-coverage areas, to
21 exclusionary areas.

22 Your Honor, when Congress wants to deal with
23 that subject, and I think really the shoe is on the other
24 foot. In the absence of any language concerning the
25 pre-emptive effect of exclusion, there is no exclusion.

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2 Because when the Congress wants to exclude and pre-empt, it
3 does so in the fashion which it did in 14-A of the Act
4 dealing with supervisors. When Congress intends a
5 no-man's land to be created, you cannot buy construction,
6 your Honor, I respectfully suggest, you cannot buy the
7 construction of the act, and in the the absence of language,
8 in the absence of any other indication of a Congressional
9 intent, you cannot conclude that it was intended to
10 pre-empt by exclusion to create a no man's land.
11 The cases say to the opposite.

12 The legislative history of 14A in 1959 which
13 we have set out here, says precisely to the opposite
14 effect. There must be an express declaration by the Con-
15 gress, or at least the clear intention on the part of the
16 Congress, to exclude and pre-empt and thereby create a
17 no man's land.

18 You cannot infer or imply that. The board
19 doesn't have the authority to do it. There is nothing in
20 the act which gave the board the authority to decide
21 National Labor policy. That's legislation. That is no
22 longer the administration of an act.

23 As a matter of fact, your Honor, before the
24 adoption of Section 14C of the Act the board attempted in
25 several instances to say, here is a whole class of

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2 employees which we have decided to exclude from the cover-
3 age of the act because of policy considerations which we have
4 developed. The Supreme Court uniformly struck down any such
5 efforts on the part of the board. That was the hotel
6 workers case and the office workers cases, and they are
7 in our brief. They don't have the power to rule out a
8 class of employees and they have the power to rule out a
9 class of employers only because it has now been given to
10 them specifically under 14-C. That is very significant.
11 Because 14-C permits them to rule out only a class of employ-
12 ers. It gives them no power to rule out any class of
13 employees, as they have done here in effect.

14 Because they said that those employees who are
15 primarily students were excluded from the coverage of the
16 act. That's what they decided in Cedars-Sinai.

17 One last word, your Honor, on the question
18 of jurisdiction. In some ways it is almost unfortunate
19 that it is going to be quite that easy for your Honor
20 to apply 2283 here and not reach the more difficult questions
21 of pre-emption. I think we are agreed, and I think it is
22 implicit -- more than implicit, but explicit in your
23 Honor's ruling on the Albert Einstein motion for inter-
24 vention, that 2283 is at least facially violated here by the
25 action brought by the board. 2283 has a 4th exception

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2 that is not contained in the language of 2283 but which
3 is derived from the Nash-Finch decision.

4 Now, your Honor, the point is made by Mr.
5 Taylor that this case comes squarely under Nash-Finch
6 even though in that case pre-emption was virtually
7 acknowledged, and here it's the issue. But I want to point
8 to one very critical difference that I think your Honor
9 drew out in the questioning of Mr. Taylor. In Nash-Finch
10 the posture of the proceeding at the time of the federal
11 court intervention was that there was a state court injunction
12 of picketing activities that were clearly covered under
13 the National Act. There was an injunction stopping the
14 picketing, your Honor. There was an actual direct
15 substantial effect which was clearly contrary to what the
16 National Act permitted. Those were the circumstances,
17 the very unique circumstances involving irreparable
18 and substantial harm on the spot because the injunction
19 was immediately operative, your Honor. Those were the
20 circumstances which obtained in Nash-Finch. There is nothing
21 vaguely resembling that here.

22 There is no activity underway which is covered
23 or not covered or implicated or not implicated by the
24 National Act at the present moment. The State Board
25 still has to deal with the question of whether they are

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2 students or employees, and Judge Briant of this court
3 went far out of his way to suggest to the State Board
4 when it ever gets the case it should make sure they find out
5 whether they are students or employees. It is not a closed
6 question. It is a viable issue, yet to be tried out before
7 the State Board.

8 We think clearly they are employees. More than
9 that, that the coverage under the state act is broader
10 than just employees if you look at the language of the
11 act.

12 Your Honor, if that is so, we have yet to wait
13 until the State Board makes some determination on cover-
14 age under the act, and after that certification, and after
15 that a refusal to bargain, and after that a cease and
16 desist order, and then it goes to the State Courts and
17 everything can be reviewed against except the pre-emption
18 question. Not until there is a final judgment of a court
19 does something have to do something, is there anything
20 imminently affected that may or may not be covered
21 under the National Act.

22 Now, that is a very different situation from
23 what we have here. Your Honor, we talked about the
24 La Crosse Telephone case and the other related cases, the
25 Alleghany Ludlam case. In those cases, which were also

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2 in the pre-emption area, the United States Supreme Court
3 had the question of whether they had before them in those
4 cases a status sufficiently matured and developed and
5 palpable to warrant federal jurisdiction.

6 In those cases they were confronted with certi-
7 ficates of certification that had already been issued and
8 in the case which came up from Wisconsin in the La Crosse
9 Telephone case, in that case that was final and binding and
10 and virtually not subject to judicial review beyond that.
11 In the Alleghany Ludlam case, while it didn't have that
12 same degree of finality, it involved a certification which
13 fixed the status.

14 Now, Judge Douglas in writing for the
15 Court in that case just about suggested that anything
16 less than that wouldn't be enough but certification,
17 fixing a status created a sufficiently palpable and
18 justicial issue for federal jurisdiction.

19 We have nothing like that hear, your Honor.
20 As a matter of fact, if this were a case where just
21 the employer came into court to review the action --
22 let's assume that the State Board had assumed jurisdiction,
23 your Honor, and said okay, we are going forward to hear-
24 ings now. Could the employer come into court to review that
25 or enjoin it or get declaratory leave? Clearly not.

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2 There are a whole slew of cases on a federal and state
3 level, that at that posture of the development of a labor
4 case it is not a final order or judgment capable of review.
5 It clearly would not be a justiciable controversy either
6 under state or federal law.

7 We have an even lesser status involved here.
8 There is no threat of irreparable injury. We renew our
9 invitation to the National Board to come into the state court
10 proceeding. The fact of the matter is they might have
11 limited rights to intervene or come in after a judgment
12 at the Supreme Court level. We will waive any objections.
13 The National Board can raise these questions before the
14 State Courts, ultimately have reviewed before the United
15 States Supreme Court if they are dissatisfied with the
16 outcome of it, and deal with the question of pre-emption by
17 a competent court which has jurisdiction of the matter and
18 is dealing with it.

19 They are not lacking in opportunity to get
20 an adjudication on that question if they want it. And in
21 a proceeding which is pending. And we have no objection to
22 their coming in at any stage in the State Court proceeding
23 to deal with the question of pre-emption. Identical with
24 what we have here for all intents and purposes.

25 THE COURT: Well, I'm sure they have fully

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2 considered your invitation and I don't expect they are
3 going to change their minds.

4 I have one question. You are about finished,
5 Mr. Gordon?

6 MR. GORDON: Yes.

7 THE COURT: Do you have any other information
8 or any comments you want to make about the question I asked
9 Mr. Taylor with respect to Court review --

10 MR. GORDON: Of the employee status, your
11 Honor?

12 THE COURT: Not by me. I am thinking about
13 the Kansas City and Cedars-Sinai cases for holdings by the
14 board. Is there any likelihood of appellate review to
15 your knowledge?

16 MR. GORDON: Let me be as candid as I can
17 in terms of what I know. I know of no pending review
18 or intended review of the Kansas City decision.

19 I am aware of the fact that it is in contempla-
20 tion that a review, judicial review will be sought of the
21 Cedars-Sina and three other decisions of the Board involving
22 St. Clare's Hospital where CIR is a petitioner --

23 THE COURT: I perhaps didn't make my question
24 clear.

25 I wondered if there was now anything underway,

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2 I don't mean something which is being considered.

3 MR. GORDON: No proceeding pending. I think
4 I can that with some degree of certainty. There is no
5 judicial review pending of any of the NLRB decisions on
6 employee status.

7 THE COURT: Thank you, Mr. Gordon.

8 MR. GORDON: May I make one last point in
9 terms of the timing?

10 THE COURT: Yes.

11 MR GORDON: The Appellate Division in an order
12 which appeared in the Law Journal either today or yester-
13 day, and I have a copy of that action, has denied the motion
14 made by some of the appellant hospitals there for an
15 adjournment. The briefs of the hospitals are due, I believe,
16 on December 27th, our briefs are due on January 5th,
17 their reply briefs are due on January 12th, and the matter
18 is scheduled for the January 1977 term.

19 THE COURT: January what?

20 MR. GORDON: For January 1977 term. And
21 the hospitals made an attempt by reason of the pendency
22 of this action to get a further stay -- to get an adjourn-
23 ment of the appeal in the Appellate Division and the Appel-
24 late Division has just denied that, as appears from the
25 order which I have given your Honor.

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2 I think that if it is not too presumptuous
3 to request it, it would be very helpful to have an expeditious
4 position here in light of the scheduling we have before the
5 Appellate Division. I think it would be desirable for that
6 court to know, to have the benefit of what disposition is
7 being made here.

8 Thank you.

9 THE COURT: Before I get back to you, Mr. Taylor,
10 is there anybody among the amici who wish to be heard?

11 MR. BODNER: Yes, your Honor.

12 I would just ask if the State Labor Board,
13 who is also a party defendant, wishes to precede me, if
14 the Court so please?

15 MR. PHILLIPPS: Norbert Phillipps, counsel
16 to the Labor Relations Board.

17 I think our position is brought out in the
18 papers we filed. We will abide by whatever decisions
19 the Court makes. As you can tell from our papers, we
20 recognize that this was a very difficult problem. There is
21 much convincing authority on each side, but on balance the
22 State Board felt that it should dismiss the proceedings, which
23 it has done, so we are not at this posture in basic
24 disagreement with the National Board.

25 However, we have no objection to taking the

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2 cases. If the Courts find that we have jurisdiction, we are
3 willing to proceed with them, your Honor.

4 THE COURT: Thank you.

5 MR.BODNER: Your Honor --

6 THE COURT: What is your name?

7 MR. BODNER: Gerald Bodner, with the firm
8 of Weiner, Newberger & Sye, counsel to the Albert Einstein
9 College of Medicine.

10 THE COURT: How much more time will you want?

11 MR. BODNER: Three or fourminutes.

12 MR. TAYLOR: I would like three or four
13 minutes, your Honor.

14 THE COURT: I would like to take three or
15 four minutes right now.

16 (Recess.)

17 THE COURT: Mr. Bodner.

18 MR.BODNER: I promised to be breif and I will
19 try to be.

20 Just to address myself very quickly to some
21 of the most immediate points raised here.

22 I think you have heard very clearly by Mr. Gor-
23 don just now that the Bethlehem case is certainly one
24 of the most relevant and important cases in this area. I
25 would just ask that you note its similarity to this case.

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2 In Bethlehem the board, not because of a statutory pro-
3 scription, but because of its own policy at that time,
4 excluded supervisors from the category of employees.
5 They, by the way, have also done the same with other non-
6 statutorily excluded categories, such as managerial or
7 confidential employees, among others.

8 The exact same is true here. The board, not
9 for statutory reasons but for its own policy, has
10 excluded these individuals from the collective bargaining
11 rights and status of employees.

12 Secondly, with regard --

13 THE COURT: Congress wrote that into law, is
14 that right?

15 MR. BODNER: The Bethlehem case, your Honor,
16 was prior to the statutory proscription of supervisors
17 now contained in the act. You will notice that Bethlehem
18 had occurred at a time when there was no Congressional
19 exclusion of supervisors, it was a board policy of
20 exclusion.

21 The Court refers to it that way, as does
22 La Crosse, where the Supreme Court was commenting on Bethle-
23 hem.

24 THE COURT: You mentioned that another
25 example, manager, are there also situations where people

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2 who are more closely related to the employee category
3 have been excluded?

4 MR.BODNER: Confidential employees, your
5 Honor, is another example.

6 THE COURT: Confidential employees?

7 MR. BODNER: Confidential employees.

8 THE COURT: What do you mean by that?

9 MR.BODNER: An individual who has access to
10 labor relations material. He clearly is an employee in
11 the normal use of that word, but the board excludes him
12 by policy, not by --

13 THE COURT: I still don't understand what
14 kind of work this person does.

15 MR. BODNER: Somebody who might work as a
16 special assistant to the president of an institution,
17 or even perhaps a secretary to the president of the
18 institution who has access to labor relations matters.

19 THE COURT: Well, there, it seems to me, like
20 having a supervisor or a foreman in the union, the
21 rank and file. The conflict point that Mr. Gordon makes
22 so much of. Obviously you don't want a fellow who is
23 working for the president and who has access to confidential
24 labor matters to be able to participate with the union
25 in collective bargaining.

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2 MR.BODNER: Actually, I meant it for the spe-
3 cific point that it not a statutory proscription but a
4 board policy.

5 THE COURT: I understand that. I am wonder-
6 ing if there is an example like this one, of people who are
7 like employees, who have been excluded.

8 MR. BODNER: Confidential employees are other-
9 wise like employees, but I would suggest, your Honor, that
10 here, too, the board has determined that the overall
11 labor policy of a health care institution would not be
12 served by having certain individuals which the National
13 Board says are primarily students having collective bar-
14 gaining rights.

15 Now, certainly the board, in essence, has
16 determined that the overall labor relations policy of the
17 overall health care institution, over which they clearly
18 have jurisdiction, is best served, and I think implicit
19 in it whether it be conflict or the board's feeling
20 that this is not the best labor policy for health care
21 institutions, I couldn't say, but in both of these
22 notions the board has determined it would be better for
23 the overall labor policy of our health care institutions
24 not to have to bargain with these individuals who are
25 primarily students.

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2 THE COURT: Does your client as a matter
3 of its own internal functioning agree with the position
4 of the board that this is a good thing?

5 MR. BODNER: Absolutely, your Honor, it
6 does.

7 THE COURT: Why don't you want to have the
8 residents and interns in the union, or whatever the
9 organization is, with whom the hospital bargains col-
10 lectively?

11 MR. BODNER: Let me very specifically answer
12 that question, your Honor, although I would have to
13 comment that the merits of that policy is, as I think
14 you have heard in essence from both parties, not before
15 this court, but only properly before this court in a Leedom
16 v. Kyne suit. Since you have asked I will comment on it.
17 We are an educational institution, your Honor, that has a
18 responsibility to the teaching, training, certification
19 of these individuals, and it would not aid us in our
20 educational, training responsibilities to have imposed on us
21 collective bargaining.

22 THE COURT: Certainly, I suppose, nobody would
23 disagree, what little I know of what residents and interns
24 do, that they are furthering their education. But they
25 also, not incidentally, are making a contribution, and per-

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2 haps a substantial contribution to the hospital, to the oper-
3 ation of the hospital.

4 MR. BODNER: Well --

5 THE COURT: When I was in college I didn't make
6 any contribution to the operation of the university or the
7 college.

8 MR. BODNER: Yes. Nobody denies the fact
9 of their contribution nor do they deny the value of the
10 educational experience and the, in fact, required education
11 they receive via their internship, residence or fellow
12 certification.

13 THE COURT: Perhaps, Mr. Bodner, I am getting
14 off the track. It is not up to me to decide whether or
15 not the board was acting improperly when it concluded that
16 students or residents and interns are not employees.
17 So let us go on.

18 MR. BODNER: I would certainly stand with that
19 comment. I would just note that in Bethlehem, at a time
20 when the supervisory exclusion was not mandated by
21 Congress but prior to it, in fact, as you will recall the
22 Supreme Court did not go into the adequacy of the reasons
23 for the exclusion made by board policy of supervisors,
24 but they said since there is a board policy of supervisors,
25 and I am paraphrasing, nevertheless there is exclusion.

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2 We are not here to determine whether we would have made that
3 same judgment had we sat at the National Board level.

4 Let me also just briefly comment on some other
5 points. The only cases you may have noticed that Mr.
6 Gordon cites for the idea that once the board excludes
7 somebody from employees, perhaps pre-emption didn't per-
8 tain, are these few state court decisions, not a single
9 federal court decision, dealing overwhelmingly with
10 agricultural employees and a domestic employee in a one man
11 unit. You will note, your Honor, that Congress said most
12 specifically in passing the exclusion for agricultural
13 employees, that this exclusion is for an administrative
14 reason alone, not for a national labor policy reason.
15 There is not a single case cited by the CIR where individuals
16 were excluded for National Labor policy reasons by this
17 board, where pre-emption did not pertain. It pertained
18 in Bethlehem, it pertained in La Crosse, to mention two
19 Supreme Court decisions, where those precise facts
20 were at hand.

21 Thirdly, your Honor, I think you have heard
22 Mr. Gordon indicate that the determining provision set
23 by Congress is Section 14 of the act. I could do no
24 more than refer you to the specifics of Section 14, which
25 say rather clearly, that pre-emption doesn't pertain where

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the National Board has declined jurisdiction over the class or category of employers because it is not within its dollar volume standards.

I am paraphrasing both 14C1 and 2.

Here the National Board has said most explicitly we assert jurisdiction over this employer. They have said in their line of cases we assert jurisdiction over the class and category of employers, and they have even issued an advisory opinion for Misericordia, for Stein saying we are willing to take jurisdiction over you as an employer and you to meet our jurisdictional standards.

That is a provision set by Congress on Federal state relations. I would also comment very quickly on the various comments you have heard on Congress' intent to pre-empt. Mr. Gordon has been saying, in various ways, Congress never said specifically that we intend to pre-empt if the National Board makes this decision.

Obviously Congress doesn't speak in those languages at the time they are enacting legislation.

There isn't the slightest question that I could find, sir, and I have read through all the papers most carefully, in a clear Congressional statement summaries by Mondale, Williams, and so on, that Mr. Taylor has referred to, making specifically clear a Congressional

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2 intention to pre-empt state labor acts from operating at
3 health care institutions. And there is no specific denial
4 of that fact by the CIR. Only the concept that they didn't
5 say -- Congress never said we intend to deny in this circum-
6 stance and that circumstance, and so on.

7 Indeed, all the quotations in the CIR brief
8 on the issue of pre-emption, Congressional intention to pre-
9 empt, presumes it. Because what they do, they refer to
10 various individual Congressmen saying granted there is
11 pre-emption, we want to make it known that the NLRB can still
12 cede jurisdiction under 10A.

13 Unfortunately, that is not an issue here.
14 They haven't and probably, I would agree with Mr. Gordon,
15 will not.

16 You have heard that the controlling factors
17 are occupying the field. If the NLRB has occupied the
18 field you have heard Mr. Gordon say there is pre-emption and
19 we agree with that standard. The question here is,
20 will you accept what you have heard Mr. Gordon say,
21 Mr. Taylor had said, namely, I heard Mr. Taylor say that the
22 NLRB has no intention of regulating; or will you accept
23 what I heard Mr. Taylor say and what I have seen in the
24 board's Kansas City decision, namely, we are making very
25 clear that we are here regulating. We are making very clear

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2 that we are not abandoning the field or choosing to be
3 silent, to use the word in the CIR brief. We are
4 determining that these individuals shall not have col-
5 lective bargaining rights as a matter of National Labor
6 policy. And that is as close as I can get without reading
7 the citation from the Kansas City revised decision.

8 Then you have heard Mr. Gordon say clearly,
9 and we certainly agree, clearly there is the issue of
10 conflict. What could be a greater conflict than to have
11 the same individuals which the National Board has said should
12 not have collective bargaining rights, be given those
13 collective bargaining rights by the state board?

14 THE COURT: That is what I was trying to
15 get at. understand the conflict; that is, the National
16 Board says these people shouldn't be regulated and the
17 State Board says yes, they should be.

18 Obviously, there are different points of view.
19 But since the National Board has decided that we are not
20 going to treat these people as employees, how is National
21 policy hurt if the state board then decides to regulate
22 them? I don't see the impact on national policy if New York
23 State decides, since the National Board isn't going to do
24 anything about this, we will.

25 MR.BODNER: Let me comment in two sentences,

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2 your Honor.

3 THE COURT: If the state board then regulates
4 in a way which comes within the -- is clearly in viola-
5 tion of federal policy, then we have a different prob-
6 lem.

7 MR.BODNER: One, the National Board has
8 in essence said that the entire labor relations of health
9 care institutions is best served by having certain in-
10 dividuals having collective bargaining rights and certain
11 not having collective bargaining rights, and in the latter
12 category belong house staff. They have clearly said that
13 these individuals should not have collective bargaining
14 rights. I would suggest --

15 THE COURT: In terms of the national policy.

16 MR.BODNER: Then indeed it was specifically
17 the words QQ

18 THE COURT: Unless they decide in terms of the
19 state policy that these people should be subject to state
20 regulation and then in their regulation of these people
21 the state doesn't do anything which conflicts with the
22 national program, why not?

23 MR.BODNER: When you say "doesn't conflict,"
24 if the state board were to give these individuals collect-
25 ive bargaining rights, it certainly would conflict with the

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2 national program of having health care institutions having
3 to bargain with only certain individuals and not with others.

4 THE COURT: Well, put it a different way,
5 how does it interfere with or upset or lead to some
6 detrimental impact on the national policy? I understand it
7 is different from the national policy but I don't see why
8 that leads to some bad result.

9 MR.BODNER: Well, I would suggest that
10 difference is innately bad in terms of the application
11 of a uniform labor policy, and let me briefly comment
12 on it. You have heard it said that we can't really have
13 a uniform policy anyway because we do have public employees
14 under separate law. When Congress and the courts indicated
15 the need for a uniform policy, obviously they were talking
16 uniform coverage, and that is in this case, private
17 employers. Here there would be, save for this New York
18 State Labor Board being moved to rule otherwise, a uniform
19 policy among all National Board covered employers not to have
20 collective bargaining rights for house staff. I would
21 suggest, your Honor, that in the view of Congress and
22 the courts, difference is conflict and difference is improp-
23 per.

24 There is a clear expression in the case for a
25 uniform labor policy, and that in itself is inherently

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2 bad.

3 Did you wish me to deal further with that
4 point?

5 THE COURT: No.

6 MR. BODNER: Finishing up, your Honor, it has
7 been suggested that essentially the last comment I think
8 we left uncovered was that essentially there was something
9 in the nature of a police power right under the Tenth
10 Amendment that cannot be pre-empted. I would merely
11 suggest that the cases, including the decisions in the
12 federal courts, have made rather clear that in the area of
13 health care institutions as well this police power con-
14 cept does not overcome the clear application of pre-emption.

15 Finally, and I think I started off with
16 you asking the question on irreparable harm, it is clearly
17 our position that to have the continuing confusion and un-
18 certainty that would result until a federal court
19 determines once and for all the question of federal pre-
20 emption, is more than substantial as irreparable harm in and
21 of itself.

22 THE COURT: Thank you, Mr. Bodner.

23 Mr. Taylor.

24 MR. TAYLOR: May it please the Court, on the
25 question of impact on National Labor policy, if we assume

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2 that the board has the jurisdiction and the exclusive juris-
3 diction to decide whether interns and residents and
4 clinical fellows ought to have collective bargaining rights
5 or not, which is essentially what the board thought it was
6 deciding, then it would be inherently in conflict if the
7 board decides that they ought not to, as a matter of
8 National Labor policy they should not have collective bar-
9 gaining rights, that it would deserve the National Labor
10 Relations policy for them to have collective bargaining
11 rights. It would necessarily be in conflict for the
12 state to come along behind and provide the very collective
13 bargaining rights which the board has held they should
14 not have. I suggest to the Court that the potential for
15 conflict is extreme, that it is a direct and severe con-
16 flict, that it is a contradiction of a ruling of the board.

17 THE COURT: Taking an example, a state
18 statute dealing with tender offers, that has a
19 national impact. If a company within a state has stock-
20 holders in various other states obviously it will
21 have a national impact. So one can question whether
22 state statutes on tender offers ought to be -- how they should
23 be viewed in light of the Williams Act.

24 Now, here if the impact is purely local, what
25 difference does it make from the standpoint of national

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2 policy whether, since the board has decided that it
3 isn't going to regulate and, as you put it, has decided
4 that these people shouldn't have collective bargaining
5 rights, is there an impact that is more than local if
6 in New York State the residents, interns are permitted to
7 participate in collective bargaining and in New Jersey they
8 aren't?

9 MR. TAYLOR: I would assume in the area of ten-
10 der offers there is still some role for the states to play.
11 The Congress has not totally pre-empted the field.

12 Now, the question in the area of labor
13 relations is whether Congress has totally pre-empted the
14 field so that there is no role left for the states to play.
15 If that is the case, then --

16 THE COURT: Let's assume that is so, I still
17 don't understand why the board feels that it is a good
18 thing from the standpoint of national policy to exclude the
19 people we are talking about.

20 MR. TAYLOR: For that I respectfully
21 refer the Court to the board's decisions. I am afraid that
22 is as much help as I can be to the Court on that
23 question.

24 On the question of abstention, and by the
25 way, before leaving that I would also simply mention

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2 that the Court might wish to read the Pennsylvania Supreme
3 Court decision in which the Pennsylvania Supreme Court,
4 and I might take a minute to point out that
5 there were two issues before the Pennsylvania Supreme Court.
6 One was the question of whether there was pre-emption with
7 respect to privately run, privately owned hospitals. But
8 then there was also another case dealing with state run and
9 state owned hospitals. There the State Supreme Court
10 properly asserted jurisdiction because the board quite
11 clearly doesn't have it. And found on the merits, reaching
12 the merits, that house staff were students and not
13 employees. After examining that policy they agree with
14 the board on the merits and I might invite the Court to
15 their reasoning and why they decided that way.

16 Turning to the question of abstention, I wanted
17 to make sure that the Court was aware of Mr. Justice White's
18 remarks in his dissenting opinion in the Nash-Finch case.
19 This deals with a question of whether the Court ought to
20 wait and allow the state courts to continue to act because
21 possibly they might come out with the right result.

22 Mr. Justice White said the following,
23 and this is at page 154 of 404 US, "Rather than allowing
24 the union to appeal the injunction through the state court
25 system and to this court if necessary, as the union would

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2 ordinarily have to do, the Court today permits the board
3 to short-circuit that process by securing a federal
4 injunction solely upon allegations that the conduct of the
5 union was arguably protected under federal law and was
6 within the exclusive jurisdiction of the NLRB."

7 I would refer the Court to that on the question
8 of abstention.

9 I would also suggest to the Court that
10 there is a very good reason for that position, and that
11 that reason is expressed in the Garmon case.

12 Mr. Justice Frankfurter said in Garmon,
13 at page 242 of 359 US, "We have necessarily been concerned
14 with the potential," and I stress the word potential,
15 "conflict of two law enforcing authorities with the
16 disharmonies inherent in two systems, one federal and the
17 other state, of inconsistent standards of substantive law
18 and differing remedial schemes."

19 In other words, it is far better for the
20 federal court to step in and take the jurisdiction -- tell
21 the state court it doesn't have jurisdiction, because
22 that is what we are really about, tell it that early,
23 that it is far less a disharmony to the state court system
24 to do that early than to wait and have to do it to the Court
25 of Appeals of the State of New York. That is why Nash-Finch

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2 was decided as it was and that is the principle expressed
3 in Garmon.

4 When it says if there is a potential that
5 it is pre-empted, let's not get into the disharmonies. Let
6 us not let them develop. That will only exacerbate the
7 situation.

8 Just to get into the Bethlehem case briefly,
9 to make sure the Court understands what the facts were in
10 that case, that case arose prior to --

11 THE COURT: I think, Mr. Taylor, I know that
12 case.

13 MR. TAYLOR: Well, there was some suggestion
14 that it dealt with the Taft-Hartley amendments which exclude
15 supervisors from coverage under the acts.

16 The only point I wanted to make was the case
17 arose prior to the amendments and indeed prior to the amend-
18 ments the court had held, in a case call Packard, which is
19 mentioned in Bethlehem, that the board had the discretion
20 to include supervisors or not, to allow them to organize
21 or not. And the board had exercised its discretion not to
22 do so, and it held that it would not serve National Labor
23 policy to do so. And the state board said, all right,
24 the New York State Board as a matter of fact said, all right,
25 if the federal board isn't going to do it, we are.

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And the Supreme Court said no, and the Supreme Court said its reason for saying that was that where federal failure of federal officials -- in other words, this matter wasn't fully in their jurisdiction to allow or not allow supervisors not to work if they chose not to do that took on a character or ruling that no such regulation is appropriate or approved pursuant to the policy of statute. Therefore, they would not allow the state board to enter the field.

Finally, in Cedars-Sina, just to make one thing clear, the board in no sense of the word refused to assert jurisdiction or in any way indicated that it was not asserting jurisdiction. Indeed the board said at the very beginning of that case on page 2 of the slip opinion, "The parties have stipulated and we find that the employers engaged in commerce. Accordingly we find it will effectuate the policy of the act to assert jurisdiction herein."

And the board has not changed that position in any sense. All the board has sought to make clear, and perhaps the board's use of the word pre-emption was a bit confusing because the word certainly was not intending to decide the issue of pre-emption. That clearly is for the Court. What the board attempted and what the board sought to make clear was that it was not ceding

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2 jurisdiction in any sense.

3 Thank you.

4 THE COURT: All right, Mr. Taylor. Thank
5 you.

6 All right, gentlemen, this has been very
7 helpful. I will get to work on this promptly. I don't
8 make any predictions, however, as to when I will reach a
9 conclusion.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
:
National Labor Relations Board,

Plaintiff,

-against-

Committee of Interns and Residents, and
The New York State Labor Relations
Board,

Defendants.
:
-----X

Civ. 76-5119
(CES)

AFFIDAVIT

STATE OF NEW YORK)
) SS:-
COUNTY OF NEW YORK)

EDWARD T. GLUCKMANN, being duly sworn, deposes and says:

1. I am the Executive Director of the Committee of Interns and Residents ("CIR"), one of the defendants in the above-entitled action, and I submit this affidavit in opposition to the motion of the plaintiff, the National Labor Relations Board ("NLRB"), for a preliminary injunction, and in favor of the motion of the CIR for summary judgment in favor of the CIR. Except where otherwise indicated, I am personally familiar with the facts hereinafter set forth.

2. I have read the complaint of the NLRB and for the purposes of brevity, I incorporate by reference, as if more fully set forth here, all of the allegations of the answer of the CIR setting forth matters of fact other than those involving

legal proceedings or conclusions, or legislative history or intent, and hereby verify those allegations and request their consideration upon the motion of the CIR for summary judgment.

3. In addition to the matters set forth in the answer, it will be helpful for the Court to be apprised of the following circumstances in connection with the CIR motion for summary judgment:

4. As will appear more fully in a supporting memorandum of law to be submitted by our counsel in opposition to the motion for a preliminary injunction and in favor of our cross-motion for summary judgment, the clear and overwhelming purpose and intention of the Congress in enacting Public Law 93-360 ("PL 93-360"), the health care facilities amendments to the National Labor Relations Act ("NLRA"), was to avoid the threat to patient care at voluntary hospitals caused by organizational strikes, and to minimize the impact of impasse strikes upon patients at voluntary hospitals. The effort of the NLRB in this action to exclude house staff officers, and their labor disputes, from coverage or regulations under the New York State Labor Relations Act ("SLRA"), as well as from the coverage of the NLRA, is in direct conflict with the foregoing purpose and intention of the Congress, and the recent experience of the CIR demonstrates the conflict.

5. Following the NLRB decision in Cedars-Sinai, as appears from the complaint and the answer in this action,

most of the voluntary hospitals with whom the CIR had long-standing collective bargaining contractual and negotiational relationships, cited the Cedars-Sinai decision of the NLRB as grounds for refusal to negotiate or bargain collectively. The CIR thereupon attempted to follow a peaceful and legally-prescribed method for resolving the organizational disputes which had arisen between the CIR and the voluntary hospitals in New York City by instituting appropriate certification and unfair labor practice charges by the New York State Labor Relations Board ("SLRB"). The voluntary hospitals in those SLRB proceedings invoked a combination of the decision of the NLRB in Cedars-Sinai and the doctrine of federal preemption as grounds for refusing to submit to the jurisdiction of the SLRB, and the SLRB sustained those objections.

6. With few exceptions, CIR contracts have October 1 anniversary dates and October 1, 1976, termination dates. On October 1, 1976, the CIR was confronted with virtually a total failure on the part of the voluntary hospitals to recognize or bargain collectively with the CIR, the unavailability of the NLRB to provide any recourse with respect to such denial of recognition, and the unwillingness of the SLRB to assume jurisdiction over the problem. Judicial proceedings were timely instituted by the CIR in the New York State Supreme Court to review the action of the SLRB, but those judicial proceedings were stalled and delayed by the voluntary hospitals involved, first by motions to intervene, then by adjournments at their instance,

then by ex parte removal of the state court proceedings to this Court on the eve of the state court hearing, then by extensions and adjournments by the hospitals of the motion of the CIR to remand the proceedings to the state courts, and then by further adjournments by the hospitals of the state court disposition after remand. Not until October 22, 1976, was a judgment rendered sustaining SLRB jurisdiction, and that decision was promptly appealed by the voluntary hospitals and a stay of enforcement by the SLRB obtained by those hospitals.

7. As of October 1, 1976, therefore, the CIR was without any alternatives, pending lengthy litigation and subsequent administrative proceedings, other than to withdraw from its representation of house staff officers at voluntary hospitals in New York City (which representation had been in effect since 1957), or to strike to obtain recognition, collective bargaining, and contracts.

8. Prior to October 1, 1976, CIR sent strike notices to each voluntary hospital whose contract with CIR was expiring October 1, 1976, where such institution did not agree to continue recognition of CIR as the collective bargaining agent for the house staff at the institution.

9. Prior to October 1, 1976, after increasing concern over the impact of a house staff strike at their institutions, five voluntary hospitals (Maimonides, Bronx-Lebanon, Brooklyn-Cumberland, Kingsbrook and Montefiore hospitals) agreed

to continue recognition of CIR and negotiated new contracts effective October 1, 1976. Even at those institutions sporadic job actions and mass house staff meetings and rallies occurred before recognition was achieved.

10. Commencing October 5, 1976, strikes were instituted by the CIR and the local house staffs at Brookdale, Albert Einstein, and Flower Fifth Avenue hospitals. Affiliates of these institutions which were also affected included four facilities of the New York City Health and Hospitals Corporation ("HHC") (Lincoln, Jacobi, Metropolitan and Bird S. Coler hospitals).

11. The strike at Brookdale started Tuesday, October 5, 1976, at 7 A.M., and continued until Monday, October 11, 1976, at 2 P.M. The strike involved most of the 250 house staff and affected approximately 1,000 in-patients and several hundred out-patients.

12. The strike at Albert Einstein started Tuesday, October 5, 1976, at 7 A.M., and continued until Friday, October 15, 1976, at 7 A.M. The strike involved most of the 150 house staff on the payroll of Albert Einstein working at its hospitals and at Lincoln and Jacobi hospitals were also disrupted by the strike. This strike affected approximately 400 in-patients at Albert Einstein and several hundred in and out-patients (mainly psychiatric patients) at Lincoln and Jacobi.

13. The strike at Flower-Fifth Avenue started Tuesday, October 5, 1976, at 7 A.M., and ended Friday, October 15, 1976, at 8 A.M. The strike involved most of the 150 house

staff on the Flower-Fifth Avenue payroll working at that hospital and at Metropolitan and Bird S. Coler, HHC-affiliated institutions. House staff at Metropolitan and Bird S. Coler were also affected by the strike. The strike at these institutions impacted on approximately 400 in-patients and several hundred additional out-patients at Flower-Fifth Avenue and approximately several hundred additional patients at Metropolitan and Coler.

14. The three strikes led to continued recognition and a new contract at Flower-Fifth Avenue.

15. After the October 5, 1976, strike at the above hospitals, Arthur C. Logan and Jewish Hospital of Brooklyn agreed to continue to recognize CIR to avoid strikes at those institutions.

16. The described house staff strikes of October, 1976, would have been unnecessary and unlawful under the SLRA. Absent the preemption and ouster of state jurisdiction claimed by the voluntary hospitals and now by the NLRB here, the CIR would have had available the machinery of the SLRB to establish the right of the CIR to represent house staff where a viable issue existed on that score, or an unfair labor practice charge where the CIR did represent house staff and bargaining was refused by the hospital. It may, in fact, be said with certainty, that absent such preemption and ouster, most, if not all, of the voluntary hospitals with which the CIR had bargained and negotiated in the past, and which the CIR was obliged to strike October, 1976, would have continued to recog-

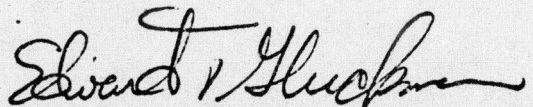
nize, negotiate and enter into contracts with the CIR without strikes or any other threatening incidents relating to patient care.

17. Still another aspect of this action is the contention of the NLRB that some uniform national labor policy is served by excluding house staff officers at voluntary hospitals from state and local labor relations coverage, as well as from federal coverage. No such uniformity can or does exist with respect to house staff officers nationally or in New York even if voluntary hospital house staff officers are excluded from the coverage of state and local as well as national labor relations laws. For only 55% of internship positions offered in the United States are to non-governmental, non-profit hospitals. See American Medical Association, Directory of Approved Residencies, 1974-5, page 4. Accordingly, a very substantial portion of all house staff officers train, work and are employed at public institutions which are not subject to the NLRA or NLRB, and are subject to state and local legislation governing public employees. Major house staff associations, engaged in collective bargaining and parties to collective bargaining agreements, are situated in Los Angeles County Hospital, California; Cook County Hospital, Illinois; and the University of Michigan. In New York City, 40% of the house staff officers represented by the CIR under contract are employed by the HHC and, as such, have engaged and are now pre-

sently engaged in collective bargaining, and have been and are covered by collective bargaining contracts.

18. Not only are many house staff officers,--outside the effect of the NLRB decision in Cedars-Sinai,--at public institutions where collective bargaining is taking place, but, in addition, many of the house staff officers represented by the CIR at voluntary hospitals in New York City rotate from the payroll of those hospitals to the HHC payroll. When such rotation occurs, those house staff officers are represented by the CIR and subject to collective bargaining agreement between the CIR and the HHC. Such circumstances are common for house staff throughout the country.

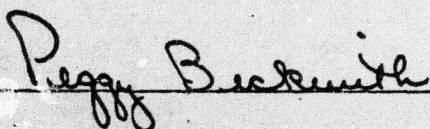
19. A substantial portion of all house staff officers are, therefore, now engaged in collective bargaining notwithstanding Cedars-Sinai or the preemption the NLRB here seeks. If uniformity is sought, it is possible only by providing labor relations law coverage to house staff officers otherwise not covered by the NLRA.



EDWARD T. GLUCKMANN

Sworn to before me this

30th day of November, 1976.



PEGGY BECKWITH
Notary Public, State of New York
No. 60-4624885
Qualified in Westchester County
Term Expires March 30, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x

National Labor Relations Board,	:	
	:	
Plaintiff,	:	Civ. 76-5119
	:	(CES)
-against-	:	
	:	
Committee of Interns and Residents,	:	
and the New York State Labor Relations	:	<u>AFFIDAVIT</u>
Board,	:	
	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MURRAY A. GORDON, ESQ., being duly sworn, deposes
and says:

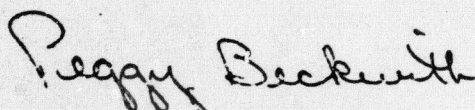
1. I am a member of the firm of Murray A. Gordon, P.C., attorneys for the defendant Committee of Interns and Residents ("CIR") in the above-entitled action, and I submit this affidavit in opposition to the motion of the plaintiff, the National Labor Relations Board, for a preliminary injunction, and in support of the cross-motion of the CIR for summary judgment. I am personally and directly familiar with the facts hereinafter set forth.

2. I have read the complaint and have prepared the answer of the CIR in the instant proceeding. For purposes of brevity, I incorporate by reference, as if more fully set forth herein, those allegations of the answer which concern administrative and judicial proceedings, and verify the allegations of the answer with respect thereto.

3. Those allegations of the answer referring to legislative history, purpose, and intent, are based upon the language of the statutes involved and public records which are more fully set forth in the memorandum of law being submitted simultaneously herewith on behalf of the CIR.


MURRAY A. GORDON

Sworn to before me this
30th day of November, 1976.


PEGGY BECKWITH
Notary Public, State of New York
I.D. 0244395
Qualified in Westchester County
Term Expires March 30, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK -

150

NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

v.

COMMITTEE OF INTERNS AND RESIDENTS,
AND THE NEW YORK STATE LABOR RELATIONS
BOARD,

Defendants.

:
:
:
: Civil Action No.
76-Civ. 5119 (CES)
:
: AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.: _____

NORBERT M. PHILLIPPS, being duly sworn, deposes
and says:

1. He is General Counsel to and attorney for Defendant, New York State Labor Relations Board, herein the State Board, and is fully familiar with the prior proceedings herein.
2. He makes this affidavit in connection with the summons and complaint in this action served upon the State Board on December 6, 1976.
3. The State Board relies upon its original determination of July 14, 1976, in Misericordia Hospital Medical Center, etc., 39 SLRB No. 32, a copy of which is attached hereto as Exhibit 1, and the related subsequent dismissals of the various other proceedings filed by Defendant, Committee of Interns and Residents.
4. Accordingly, the State Board takes no position upon this action. It will comply with any judgment and order made and entered by the Court herein, or by any other court of competent jurisdiction.

Sworn to before me this

6th day of December, 1976

Evelyn F. Novara

EVELYN F. NOVARA
Notary Public, State of New York
No. 41-510000 Expires March 30, 1978

Robert M. Phillipps

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New York State Labor Relations
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UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

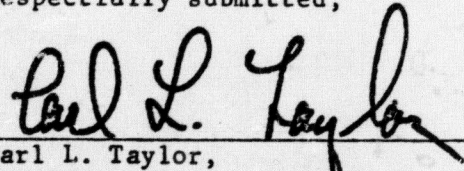
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 76-5119
	)	
COMMITTEE OF INTERNS AND	)	
RESIDENTS, AND THE NEW YORK	)	
STATE LABOR RELATIONS BOARD,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

The National Labor Relations Board, plaintiff herein, appeals to the United States Court of Appeals for the Second Circuit from an order entered against it on March 7, 1977, denying plaintiff's motion

for preliminary injunction, and granting motion of defendant
Committee of Interns and Residents for summary judgment dismissing
plaintiff's complaint.

Respectfully submitted,



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Co-Counsel: Ruth E. Peters
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- and -

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Dated: Washington, D.C.
May 3, 1977

REGION 2
N.L.R.B.

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NEW YORK, NEW YORK